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Race Relations Law Reporter

A Complete, Impartial Presentation of Basic Materials, Including:

- ★ *Court Cases*
- ★ *Legislation*
- ★ *Orders*
- ★ *Regulations*

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* On leave for academic year 1957-58.

Recent Developments . . . A Summary

Education

The United States Supreme Court has refused to allow a 30-month delay in the desegregation of Little Rock, *Arkansas*, high schools (p. 618). Earlier, the U.S. District court at Little Rock had approved the delay (p. 627) on petition of that city's school board (pp. 621, 624), but the Court of Appeals for the Eighth Circuit overruled (p. 643).

Also in *Arkansas*, the Pine Bluff School Board has delayed integration previously scheduled for this fall (p. 787).

An effort by the Dallas, *Texas*, school board to have the Federal courts resolve an asserted conflict between Federal desegregation decisions and state law has been unsuccessful (p. 656). The Court of Appeals for the Fifth Circuit found no justiciable controversy and no Federal statute conferring jurisdiction. The school board subsequently issued a statement continuing segregation for the 1958-59 school year (p. 788).

In *Tennessee*, a U.S. District Court approved the Nashville school board's grade-a-year plan for desegregation (p. 651). A motion by the New Orleans, *Louisiana*, school board to dismiss an injunction ordering desegregation was denied (p. 649). The board had sought to invoke a 1956 Louisiana Act transferring the board's authority to classify schools to a state agency. *Virginia* chartered a private, non-sectarian school operating corporation (p. 789).

Negro teachers in Moberly, *Missouri*, who alleged discrimination in rehiring after desegregation, were denied relief by a Federal district court (p. 660). The white teachers hired were found to be generally better qualified from evidence offered at the hearing. In *Massachusetts*, the legislature approved a resolution urging the President and Congress to "enact and enforce legislation" implementing the *School Segregation cases* (p. 767).

The University of *Florida* has been enjoined by a U.S. District Court from restricting admission to white persons in its graduate and graduate professional schools (p. 658). The ruling came in a suit filed in 1949 by a Negro law school applicant, who himself was found not to have proved his eligibility.

The *Louisiana* legislature enacted measures allowing the establishment of educational cooperatives (p. 768), granting the governor authority to close racially-mixed schools (p. 778), continuing school officials salaries while absent because of Federal segregation litigation, including possible imprisonment (p. 779), and providing for tuition grants to certain students (p. 780).

Governmental Facilities

A *California* state court found discrimination in the sale of FHA and VA financed housing to be constitutionally prohibited (p. 693), and granted a Negro plaintiff damages and declaratory relief. However, the Court of Appeals for the Fifth Circuit upheld a lower court's finding that a Negro plaintiff challenging segregation in Savannah, *Georgia*, Public Housing was not a proper party since she had never applied for housing (p. 700). Negroes who challenged an urban renewal program in Gadsden, *Alabama*, were also denied relief (p. 712). A U.S. District Court found the challenged program called for covenants prohibiting discrimination, and found no other evidence such discrimination was contemplated.

Organizations

The United States Supreme Court has dissolved an *Alabama* contempt citation and fine against the National Association for the Advancement of Colored People for refusal to disclose its membership lists (p. 611). Also in *Alabama*, a state circuit court dissolved an injunction against the Tuskeegee Civic Association (p. 720), finding that there was no evidence of a boycott even though individual Negroes had stopped trading with white merchants. The

suit was filed by the state's attorney general who is now the Democratic nominee for governor. It alleged the Negroes were protesting a plan to abolish Macon county as a strategem to minimize Negro voting power.

The *Florida* Supreme Court upheld the power of a state legislative investigation committee to subpoena records, including membership lists, of the NAACP and other groups (p. 725).

Transportation

In *Florida*, a Federal district court dismissed a suit brought by a Negro against a bus company for damages incurred when a white man assaulted him in a dispute over seating (p. 736). However, in *Arkansas*, that state's supreme court upheld damages awarded a white woman after a similar dispute with a Negro woman (p. 741).

A three-judge Federal court in *Tennessee* refused to order Memphis buses desegregated (p. 743), when it found the Negro plaintiff had ridden the bus only as a basis for a test case.

Labor Relations

The National Labor Relations Board refused to invalidate a union certification election in *New Jersey* because Jackie Robinson, an officer of the corporation, was alleged to have told Negro employes that white workers would take their places if the union were successful (p. 793).

The *Michigan* attorney general ruled that his state's Fair Employment Act had the effect of superseding various municipal ordinances covering the field (p. 797).

Trial Procedure

The *North Carolina* Supreme Court reversed the conviction of a Negro in an abortion case because the defendant was not allowed time to investigate and produce evidence of allegations that Negroes were excluded from the grand jury which indicted him (p. 755). In *Michigan*, a Federal court dismissed a suit by Negroes who contended that officials of that state were discriminating against Negroes in sentencing on narcotics convictions (p. 764). The court found no allegation that the named defendants (the governor and attorney general) had engaged in discriminatory conduct.

Miscellaneous

The subpoena powers of the *New Jersey* Division Against Discrimination have been upheld (p. 726). The *Massachusetts* attorney general ruled the requirement of a photograph on school applications is unlawful (p. 797). In *California*, police departments were furnished copies of a "Guide to Community Relations for Peace Officers" prepared by that state's attorney general.

Reference

The legal problems presented by various state school closing plans are discussed in a background article (p. 807). Also included is a cumulative table of cases in Volume III of the RACE RELATIONS LAW REPORTER (p. 841).

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UNITED STATES SUPREME COURT

CORPORATIONS
NAACP—Alabama

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE v. STATE of Alabama [In re: State of Alabama ex rel. Patterson, Attorney General v. NAACP].

United States Supreme Court, June 30, 1958, No. 91,———U.S.———, 78 S.Ct. 1163.

SUMMARY: The Attorney General of Alabama brought suit in an Alabama state court seeking an injunction to restrain the National Association for the Advancement of Colored People from doing business in Alabama without complying with state laws concerning registration as a foreign corporation. A temporary restraining order was issued against the Association. 1 Race Rel. L. Rep. 707. Later the state filed a motion for the production of certain books, papers and other documents, including a membership list of the Association. Against objection the court ordered the production of the documents. On refusal of the Association to produce the list, the court adjudged the Association in contempt and assessed a fine of $10,000 against it, to be raised to $100,000 if the order was not complied with in five days. 1 Race Rel. L. Rep. 917. The Alabama Supreme Court denied a petition for a writ of certiorari to review the contempt order. 1 Race Rel. L. Rep. 919. Upon the refusal of the Association to produce the demanded documents within the five-day grace period, the trial court decreed that the fine be raised to the higher figure. The Association again petitioned the Alabama Supreme Court for a writ of certiorari to review the action of the trial court. Holding that the trial court had jurisdiction and acted within its civil contempt powers, the court refused to grant the writ and dismissed the petition. 2 Race Rel. L. Rep. 177. The United States Supreme Court granted certiorari to review the constitutional question of freedom of association under the Due Process clause of the Fourteenth Amendment. The Court then found ". . . the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interest privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment." The judgment of contempt and fine were dissolved and the case remanded.

HARLAN, Justice

We review from the standpoint of its validity under the Federal Constitution a judgment of civil contempt entered against petitioner, the National Association for the Advancement of Colored People, in the courts of Alabama. The question presented is whether Alabama, consistently with the Due Process Clause of the Fourteenth Amendment, can compel petitioner to reveal to the State's Attorney General the names and addresses of all its Alabama members and agents, without regard to their positions or functions in the Association. The judgment of contempt was based upon petitioner's refusal to comply fully with a court order requiring in part the production of membership lists. Petitioner's claim is that the order, in the circumstances shown by this record, violated rights assured to petitioner and its members under the Constitution.

Alabama has a statute similar to those of many other States which requires foreign corporations, except as exempted, to qualify before doing business by filing the corporate charter with the Secretary of State and designating a place of business and an agent to receive service of proc-

ess. The statute imposes a fine on a corporation transacting intrastate business before qualifying and provides for criminal prosecution of officers of such a corporation. Ala.Code, 1940, Tit. 10, §§ 192-198. The National Association for the Advancement of Colored People is a nonprofit membership corporation organized under the laws of New York. Its purposes, fostered on a nationwide basis, are those indicated by its name,* and it operates through chartered affiliates which are independent unincorporated associations, with membership therein equivalent to membership in petitioner. The first Alabama affiliates were chartered in 1918. Since that time the aims of the Association have been advanced through activities of its affiliates, and in 1951 the Association itself opened a regional office in Alabama, at which it employed two supervisory persons and one clerical worker. The Association has never complied with the qualification statute, from which it considered itself exempt.

[*Injunction in State Court*]

In 1956 the Attorney General of Alabama brought an equity suit in the State Circuit Court, Montgomery County, to enjoin the Association from conducting further activities within, and to oust it from, the State. Among other things the bill in equity alleged that the Association had opened a regional office and had organized various affiliates in Alabama; had recruited members and solicited contributions within the State; had given financial support and furnished legal assistance to Negro students seeking admission to the state university; and had supported a Negro boycott of the bus lines in Montgomery to compel the seating of passengers without regard to race. The bill recited that the Association, by continuing to do business in Alabama without complying with the qualification statute, was "* * * causing irreparable injury to the property and civil rights of the residents and citizens of the State of Alabama for which criminal prosecution and civil actions at law afford no adequate relief. * * *" On the day the complaint was filed, the Circuit Court issued *ex parte* an order restraining the Association, *pendente lite*, from engaging in further activities within the State and forbidding it to take any steps to qualify itself to do business therein.

Petitioner demurred to the allegations of the bill and moved to dissolve the restraining order. It contended that its activities did not subject it to the qualification requirements of the statute and that in any event what the State sought to accomplish by its suit would violate rights to freedom of speech and assembly guaranteed under the Fourteenth Amendment to the Constitution of the United States. Before the date set for a hearing on this motion, the State moved for the production of a large number of the Association's records and papers, including bank statements, leases, deeds, and records containing the names and addresses of all Alabama "members" and "agents" of the Association. It alleged that all such documents were necessary for adequate preparation for the hearing, in view of petitioner's denial of the conduct of intrastate business within the meaning of the qualification statute. Over petitioner's objections, the court ordered the production of a substantial part of the requested records, including the membership lists, and postponed the hearing on the restraining order to a date later than the time ordered for production.

[*Admits Activities*]

Thereafter petitioner filed its answer to the bill in equity. It admitted its Alabama activities substantially as alleged in the complaint and that it had not qualified to do business in the State. Although still disclaiming the statute's application to it, petitioner offered to qualify if the bar from qualification made part of the restraining order were lifted, and it submitted with the answer an executed set of the forms required by the statute. However petitioner did not comply with the production order, and for this failure was adjudged in civil contempt and fined $10,000. The contempt judgment provided that the fine would be subject to reduction or remission if compliance were forthcoming within five days but otherwise would be increased to $100,000.

At the end of the five-day period petitioner produced substantially all the data called for by the production order except its membership lists, as to which it contended that Alabama could not constitutionally compel disclosure, and moved

* The Certificate of Incorporation of the Association provides that its "* * * principal objects * * * are voluntarily to promote equality of rights and eradicate caste or race prejudice among the citizens of the United States; to advance the interest of colored citizens; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law."

to modify or vacate the contempt judgment, or stay its execution pending appellate review. This motion was denied. While a similar stay application, which was later denied, was pending before the Supreme Court of Alabama, the Circuit Court made a further order adjudging petitioner in continuing contempt and increasing the fine already imposed to $100,000. Under Alabama law, see Jacoby v. Goetter, Weil & Co., 74 Ala. 427, the effect of the contempt adjudication was to foreclose petitioner from obtaining a hearing on the merits of the underlying ouster action, or from taking any steps to dissolve the temporary restraining order which had been issued *ex parte*, until it purged itself of contempt. But cf. Harrison v. St. Louis & S. F. R. Co., 232 U.S. 318, 34 S.Ct. 333, 58 L.Ed. 621; Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215.

The State Supreme Court thereafter twice dismissed petitions for certiorari to review this final contempt judgment, the first time, 265 Ala. 699, 91 So. 2d 221, for insufficiency of the petition's allegations and the second time on procedural grounds. 265 Ala. 349, 91 So.2d 214. We granted certiorari because of the importance of the constitutional questions presented. 353 U.S. 972, 77 S.Ct. 1056, 1 Ed.2d 1135.

I.

We address ourselves first to respondent's contention that we lack jurisdiction because the denial of certiorari by the Supreme Court of Alabama rests on an independent nonfederal ground, namely, that petitioner in applying for certiorari had pursued the wrong appellate remedy under state law. Respondent recognizes that our jurisdiction is not defeated if the nonfederal ground relied on by the state court is "without any fair or substantial support," Ward v. Board of County Commissioners, 253 U.S. 17, 22, 40 S.Ct. 419, 421, 64 L.Ed. 751. It thus becomes our duty to ascertain, "* * * in order that constitutional guaranties may appropriately be enforced, whether the asserted nonfederal ground independently and adequately supports the judgment." Abie State Bank v. Bryan, 282 U.S. 765, 773, 51 S.Ct. 252, 255, 75 L.Ed. 690.

The Alabama Supreme Court held that it could not consider the constitutional issues underlying the contempt judgment which related to the power of the State to order production of membership lists because review by certiorari was limited to instances "* * * where the court lacked jurisdiction of the proceeding, or where on the face of it the order disobeyed was void, or where procedural requirements with respect to citation for contempt and the like were not observed, or where the fact of contempt is not sustained * * *." 265 Ala. at page 353, 91 So.2d at page 217. The proper means for petitioner to obtain review of the judgment in light of its constitutional claims, said the court, was by way of mandamus to quash the discovery order prior to the contempt adjudication. Because of petitioner's failure to pursue this remedy, its challenge to the contempt order was restricted to the above grounds. Apparently not deeming the constitutional objections to draw into question whether "on the face of it the order disobeyed was void," the court found no infirmity in the contempt judgment under this limited scope of review. At the same time it did go on to consider petitioner's constitutional challenge to the order to produce membership lists but found it untenable since membership lists were not privileged against disclosure pursuant to reasonable state demands and since the privilege against self-incrimination was not available to corporations.

[*Unable to Reconcile*]

We are unable to reconcile the procedural holding of the Alabama Supreme Court in the present case with its past unambiguous holdings as to the scope of review available upon a writ of certiorari addressed to a contempt judgment. As early as 1909 that court said in such a case, Ex parte Dickens, 162 Ala. 272, at pages 276, 279-280, 50 So. 218, at pages 220, 221:

> "Originally, on certiorari, only the question of jurisdiction was inquired into; but this limit has been removed, and now the court 'examines the law questions involved in the case which may affect its merits.' * * * [T]he judgment of this court is that the proper way to review the action of the court in cases of this kind is by certiorari, and not by appeal.
>
> "We think that certiorari is a better remedy than mandamus, because the office of a 'mandamus' is to require the lower court or judge to act, and not 'to correct error or to reverse judicial action,' * * * whereas, in a proceeding by certiorari, errors of law in the judicial action of the lower court may be inquired into and corrected."

This statement was in full accord with the earlier case of Ex parte Boscowitz, 84 Ala. 463, 4 So. 279, and the practice in the later Alabama cases, until we reach the present one, appears to have been entirely consistent with this rule. See Ex parte Wheeler, 231 Ala. 356, 358, 165 So. 74, 75-76; Ex parte Blakey, 240 Ala. 517, 199 So. 857; Ex parte Sellers, 250 Ala. 87, 88, 33 So.2d 349, 350. For example, in Ex parte Morris, 252 Ala. 551, 42 So.2d 17, decided as late as 1949, the petitioner had been held in contempt for his refusal to obey a court order to produce names of members of the Ku Klux Klan. On writ of certiorari, constitutional grounds were urged in part for reversal of the contempt conviction. In denying the writ of certiorari, the Supreme Court concluded that petitioner had been accorded due process, and in explaining its denial the court considered and rejected various constitutional claims relating to the validity of the order. There was no intimation that the petitioner had selected an inappropriate form of appellate review to obtain consideration of all questions of law raised by a contempt judgment.

[*Provision for Review*]

The Alabama cases do indicate, as was said in the opinion below, that an order requiring production of evidence "* * * *may* be reviewed on petition for mandamus." 265 Ala. at page 353, 91 So.2d at page 217. (Italics added.) See Ex parte Hart, 240 Ala. 642, 200 So. 783; cf. Ex parte Driver, 255 Ala. 118, 50 So.2d 413. But we can discover nothing in the prior state cases which suggests that mandamus is the *exclusive* remedy for reviewing court orders after disobedience of them has led to contempt judgments. Nor, so far as we can find, do any of these prior decisions indicate that the validity of such orders can be drawn in question by way of certiorari only in instances where a defendant had no opportunity to apply for mandamus. Although the opinion below suggests no such distinction, the State now argues that this was in fact the situation in all of the earlier certiorari cases, because there the contempt adjudications, unlike here, had followed almost immediately the disobedience to the court orders. Even if that is indeed the rationale of the Alabama Supreme Court's present decision, such a local procedural rule, although it may now appear in retrospect to form part of a consistent pattern of procedures to obtain appellate review, cannot avail the State here, because petitioner could not fairly be deemed to have been apprised of its existence. Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights. Cf. Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107.

[*Reliance Justified*]

That there was justified reliance here is further indicated by what the Alabama Supreme Court said in disposing of petitioner's motion for a stay of the first contempt judgment in this case. This motion, which was filed prior to the final contempt judgment and which stressed constitutional issues, recited that "[t]he only way in which the [Association] can seek a review of the validity of the order upon which the adjudication of contempt is based [is] by filing a petition for Writ of Certiorari in this Court." In denying the motion, 265 Ala. 356, 357, 91 So.2d 220, 221, the Supreme Court stated:

> "It is the established rule of this Court that the proper method of reviewing a judgment for civil contempt of the kind here involved is by a petition for common law writ of certiorari * * *.
>
> "But the petitioner here has not applied for writ of certiorari, and we do not feel that the petition [for a stay] presently before us warrants our interference with the judgment of the Circuit Court of Montgomery County here sought to be stayed."

We hold that this Court has jurisdiction to entertain petitioner's federal claims.

II.

The Association both urges that it is constitutionally entitled to resist official inquiry into its membership lists, and that it may assert, on behalf of its members, a right personal to them to be protected from compelled disclosure by the State of their affiliation with the Association as revealed by the membership lists. We think that petitioner argues more appropriately the rights of its members, and that its nexus with them is sufficient to permit that it act as their representative before this Court. In so concluding, we reject respondent's argument that the

Association lacks standing to assert here constitutional rights pertaining to the members, who are not of course parties to the litigation.

To limit the breadth of issues which must be dealt with in particular litigation, this Court has generally insisted that parties rely only on constitutional rights which are personal to themselves. Tileston v. Ullman, 318 U.S. 44, 63 S.Ct. 493, 87 L.Ed. 603; Robertson and Kirkham, Jurisdiction of the Supreme Court (1951 ed.) § 298. This rule is related to the broader doctrine that constitutional adjudication should where possible be avoided. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-348, 56 S.Ct. 466, 482-483, 80 L.Ed. 688 (concurring opinion). The principle is not disrespected where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court. See Barrows v. Jackson, 346 U.S. 249, 255-259, 73 S.Ct. 1031, 1034-1036, 97 L.Ed. 1586; Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 183-187, 71 S.Ct. 624, 654-656, 95 L.Ed. 817 (concurring opinion).

If petitioner's rank-and-file members are constitutionally entitled to withhold their connection with the Association despite the production order, it is manifest that this right is properly assertable by the Association. To require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion. Petitioner is the appropriate party to assert these rights, because it and its members are in every practical sense identical. The Association, which provides in its constitution that "[a]ny person who is in accordance with [its] principles and policies * * *" may become a member, is but the medium through which its individual members seek to make more effective the expression of their own views. The reasonable likelihood that the Association itself through diminished financial support and membership may be adversely affected if production is compelled is a further factor pointing towards our holding that petitioner has standing to complain of the production order on behalf of its members. Cf. Pierce v. Society of Sisters, 268 U.S. 510, 534-536, 45 S.Ct. 571, 573-574, 69 L.Ed. 1070.

III.

We thus reach petitioner's claim that the production order in the state litigation trespasses upon fundamental freedoms protected by the Due Process Clause of the Fourteenth Amendment. Petitioner argues that in view of the facts and circumstances shown in the record, the effect of compelled disclosure of the membership lists will be to abridge the rights of its rank-and-file members to engage in lawful association in support of their common beliefs. It contends that governmental action which, although not directly suppressing association, nevertheless carries this consequence, can be justified only upon some overriding valid interest of the State.

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. De Jonge v. Oregon, 299 U.S. 353, 364, 57 S.Ct. 255, 259, 81 L.Ed. 278; Thomas v. Collins, 323 U.S. 516, 530, 65 S.Ct. 315, 322, 89 L.Ed. 430. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. See Gitlow v. New York, 268 U.S. 652, 666, 45 S.Ct. 625, 629, 69 L.Ed. 1138; Palko v. Connecticut, 302 U.S. 319, 324, 58 S.Ct. 149, 151, 82 L.Ed. 288; Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213; Staub v. City of Baxley, 355 U.S. 313, 321, 78 S.Ct. 277, 281, 2 L.Ed. 2d 302. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

[*Direct Action Not Vital*]

The fact that Alabama, so far as is relevant to the validity of the contempt judgment presently under review, has taken no direct action, cf. De Jonge v. Oregon, supra; Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357, to restrict the right of petitioner's members to associate freely, does not end inquiry into the effect of the production order. See American Communications Ass'n v. Douds, 339 U.S. 382, 402, 70 S.Ct. 674, 685, 94 L.Ed. 925. In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights,

even though unintended, may inevitably follow from varied forms of governmental action. Thus in Douds, the Court stressed that the legislation there challenged, which on its face sought to regulate labor unions and to secure stability in interstate commerce, would have the practical effect "of discouraging" the exercise of constitutionally protected political rights, 339 U.S. at page 393, 70 S.Ct. at page 681, and it upheld the statute only after concluding that the reasons advanced for its enactment were constitutionally sufficient to justify its possible deterrent effect upon such freedoms. Similar recognition of possible unconstitutional intimidation of the free exercise of the right to advocate underlay this Court's narrow construction of the authority of a congressional committee investigating lobbying and of an Act regulating lobbying, although in neither case was there an effort to suppress speech. United States v. Rumely, 345 U.S. 41, 46-47, 73 S.Ct. 543, 546, 97 L.Ed. 770; United States v. Harriss, 347 U.S. 612, 625-626, 74 S.Ct. 808, 815-816, 98 L.Ed. 989. The governmental action challenged may appear to be totally unrelated to protected liberties. Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment. Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660; Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 891, 87 L.Ed. 1292.

[*Effective Restraint*]

It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. When referring to the varied forms of governmental action which might interfere with freedom of assembly, it said in American Communications Ass'n v. Douds, supra, 339 U.S. at page 402, 70 S.Ct. at page 686: "A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature." Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs. Cf. United States v. Rumely, supra, 345 U.S. at pages 56-58, 73 S.Ct. at pages 550-551 (concurring opinion).

We think that the production order, in the respects here drawn in question, must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association. Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.

[*Effect of Private Pressures*]

It is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in petitioner's activities follows not from *state* action but from *private* community pressures. The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold.

We turn to the final question whether Alabama has demonstrated an interest in obtaining the disclosures it seeks from petitioner which is sufficient to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association. See American Communications Ass'n v. Douds, supra, 339 U.S. at page 400, 70 S.Ct. at page 684; Schneider v. State, 308 U.S. 147, 161 60 S.Ct. 146, 150, 84 L.Ed. 155. Such a "* * *

subordinating interest of the State must be compelling," Sweezy v. New Hampshire, 354 U.S. 234, 265, 77 S.Ct. 1203, 1219, 1 L.Ed.2d 1311 (concurring opinion). It is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize.

It is important to bear in mind that petitioner asserts no right to absolute immunity from state investigation, and no right to disregard Alabama's laws. As shown by its substanial compliance with the production order, petitioner does not deny Alabama's right to obtain from it such information as the State desires concerning the purposes of the Association and its activities within the State. Petitioner has not objected to divulging the identity of its members who are employed by or hold official positions with it. It has urged the rights solely of its ordinary rank-and-file members. This is therefore not analogous to a case involving the interest of a State in protecting its citizens in their dealings with paid solicitors or agents of foreign corporations by requiring identification. See Cantwell v. Connecticut, supra, 310 U.S. at page 306, 60 S. Ct. at page 904; Thomas v. Collins, supra, 323 U.S. at page 538, 65 S.Ct. at page 326.

[*Alabama's Interest*]

Whether there was "justification" in this instance turns solely on the substantiality of Alabama's interest in obtaining the membership lists. During the course of a hearing before the Alabama Circuit Court on a motion of petitioner to set aside the production order, the State Attorney General presented at length, under examination by petitioner, the State's reason for requesting the membership lists. The exclusive purpose was to determine whether petitioner was conducting intrastate business in violation of the Alabama foreign corporation registration statute, and the membership lists were expected to help resolve this question. The issues in the litigation commenced by Alabama by its bill in equity were whether the character of petitioner and its activities in Alabama had been such as to make petitioner subject to the registration statute, and whether the extent of petitioner's activities without qualifying suggested its permanent ouster from the State. Without intimating the slightest view upon the merits of these issues, we are unable to perceive that the disclosure of the names of petitioner's rank-and-file members has a substantial bearing on either of them. As matters stand in the state court, petitioner (1) has admitted its presence and conduct of activities in Alabama since 1918; (2) has offered to comply in all respects with the state qualification statute, although preserving its contention that the statute does not apply to it; and (3) has apparently complied satisfactorily with the production order, except for the membership lists, by furnishing the Attorney General with varied business records, its charter and statement of purposes, the names of all of its directors and officers, and with the total number of its Alabama members and the amount of their dues. These last items would not on this record appear subject to constitutional challenge and have been furnished, but whatever interest the State may have in obtaining names of ordinary members has not been shown to be sufficient to overcome petitioner's constitutional objections to the production order.

[*Bryant Case Not In Point*]

From what has already been said, we think it apparent that People of State of New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 49 S.Ct. 61, 73 L.Ed. 184, cannot be relied on in support of the State's position, for that case involved markedly different considerations in terms of the interest of the State in obtaining disclosure. There, this Court upheld, as applied to a member of a local chapter of the Ku Klux Klan, a New York statute requiring any unincorporated association which demanded an oath as a condition to membership to file with state officials copies of its "* * * constitution, by-laws, rules, regulations and oath of membership, together with a roster of its membership and a list of its officers for the current year." N. Y. Laws 1923, c. 664, §§ 53, 56. In its opinion, the Court took care to emphasize the nature of the organization which New York sought to regulate. The decision was based on the particular character of the Klan's activities, involving acts of unlawful intimidation and violence, which the Court assumed was before the state legislature when it enacted the statute, and of which the Court itself took judicial notice. Furthermore, the situation before us is significantly different from that in Bryant, because the organization there had made no effort to comply with any of the requirements of New York's statute but rather had refused to

furnish the State with *any* information as to its local activities.

We hold that the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interest privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment. And we conclude that Alabama has fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have. Accordingly, the judgment of civil contempt and the $100,000 fine which resulted from petitioner's refusal to comply with the production order in this respect must fall.

IV.

Petitioner joins with its attack upon the production order a challenge to the constitutionality of the State's *ex parte* temporary restraining order preventing it from soliciting support in Alabama, and it asserts that the Fourteenth Amendment precludes such state action. But as noted above, petitioner has never received a hearing on the merits of the ouster suit, and we do not consider these questions properly here. The Supreme Court of Alabama noted in its denial of the petition for certiorari that such petition raised solely question pertinent to the contempt adjudication. "The ultimate aim and purpose of the litigation is to determine the right of the state to enjoin petitioners from doing business in Alabama. That question, however, is not before us in this proceeding." 265 Ala. at page 352, 91 So.2d at page 216. The proper method for raising questions in the state appellate courts pertinent to the underlying suit for an injunction appears to be by appeal, after a hearing on the merits and final judgment by the lower state court. Only from the disposition of such an appeal can review be sought here.

For the reasons stated, the judgment of the Supreme Court of Alabama must be reversed and the case remanded for proceedings not inconsistent with this opinion.

Reversed.

EDUCATION

Public Schools—Arkansas

John AARON, et al. v. William G. COOPER, et al.,

United States Supreme Court, No. 942, June 30, August 28, September 12, 1958.

SUMMARY: Immediately after a United States District Court in Arkansas approved a delay in the implementation of a court-approved integration plan at Little Rock, (3 Race Rel. L. Rep. 627, *infra*), Negro plaintiffs sought a writ of certiorari in the United States Supreme Court. On June 30, the Supreme Court entered the following per curiam order denying certiorari pending action by the Court of Appeals for the Eighth Circuit.

On June 21, 1958, the District court for the Eastern District of Arkansas entered an order authorizing the members of the School Board of Little Rock, Arkansas, and the Superintendent of Schools to suspend until January 1961 a plan of integration theretofore approved by that court in August 1956, Aaron v. Cooper, 143 F.Supp. 855, and affirmed by the Court of Appeals for the Eighth Circuit in April, 1957, 243 F.2d 361. On June 23, 1958, the District Court denied an application for a stay of execution of its orders. An appeal was docketed in the Court of Appeals for the Eighth Circuit on June 24, 1958, and there is pending in that court an application for a stay of the District Court's order.

By the present petition this Court is asked to bring the case here before the Court of Appeals has had an opportunity to act upon the petition for a stay or to hear the appeal. The power of the Court to do so has been exercised but rarely, and the issues and circumstances relevant to the present petition do not warrant its exercise now. The order that the District Court suspended has, in different postures, been before the Court of Appeals for the Eighth Circuit three times already. Aaron v. Cooper, 243 F.2d 361; Thoma-

son v. Cooper, 254 F.2d 808; Faubus v. United States, 254 F.2d 797. That court is the regular court for reviewing orders of the District Court here concerned, and the appeal and the petition for a stay are matters properly to be adjudicated by it in the first instance.

We have no doubt that the Court of Appeals will recognize the vital importance of the time element in this litigation, and that it will act upon the application for a stay or the appeal in ample time to permit arrangements to be made for the next school year.

Accordingly, the petition for certiorari is denied.

After the district court order delaying integration had been overruled by the Court of Appeals for the Eighth Circuit (3 Race Rel. L. Rep. 643, *infra*), the United States Supreme Court granted certiorari at a special session and on August 28 ordered a hearing September 11, 1958:

PER CURIAM.

Having considered the oral arguments, the court is in agreement with the view expressed by counsel for the respective parties and by the Solicitor General that petitioners' present application respecting the stay of the mandate of the Court of Appeals and of the order of the District Court of June 21, 1958, necessarily involves consideration of the merits of the Court of Appeals decision reversing the order of Judge Lemley. The court is advised that the opening date of the high school will be Sept. 15. In light of this, and representations made by counsel for the School Board as to the Board's plan for filing its petition for certiorari, the court makes the following order:

One—The School Board's petition for certiorari may be filed not later than Sept. 8, 1958.

Two—The briefs of both parties on the merits may be filed not later than Sept. 10, 1958.

Three—The Solicitor General is invited to file a brief by Sept. 10, 1958, and to present oral argument at the hearing if it is so disposed.

Four—The rules of the Court requiring printing of the petition, briefs, and records are dispensed with.

Five—Oral argument upon the petition for certiorari is set for Sept. 11 at 12 noon.

Six—Action on the petitioners' application addressed to the stay of the mandate of the Court of Appeals and to the stay of the order of the District Court dated June 21, 1958, is deferred pending disposition of the petition for certiorari duly filed in accordance with the foregoing schedule.

After the September 11 hearing, the Supreme Court upheld the Court of Appeals action in overruling the district court suspension of the integration plan. On September 12 the following order was entered:

PER CURIAM.

The court, having fully deliberated upon the oral arguments supplemented by the arguments presented on Sept. 11, 1958, and all the briefs on file, is unanimously of the opinion that the judgment of the Court of Appeals for the Eighth Circuit of Aug. 18, 1958, must be affirmed. In view of the imminent commencement of the new school year at the Central High School of Little Rock, Ark., we deem it important to make prompt announcement of our judgment affirming the Court of Appeals. The expression of the views supporting our judgment will be prepared and announced in due course.

It is accordingly ordered that the judgment of the Court of Appeals for the Eighth Circuit, dated Aug. 18, 1958, reversing the judgment of the District Court for the Eastern District of Arkansas, dated June 20, 1958, be affirmed, and that the judgments of the District Court for the Eastern District of Arkansas, dated Aug. 28, 1956, and Sept. 3, 1957, enforcing the school board's plan for desegregation in compliance with the decision of this court in Brown v. Board of Education, 347 U. S. 83; 349 U. S. 294, be reinstated. It follows that the order of the Court of Appeals dated Aug. 21, 1958, staying its own mandate is of no further effect.

The judgment of this court shall be effective immediately, and shall be communicated forthwith to the District Court for the Eastern District of Arkansas.

EDUCATION
Public Schools—Arkansas

John AARON et al. v. William G. COOPER et al.

U. S. Court of Appeals for the Eighth Circuit, No. 16034.
United States District Court, Eastern District, Arkansas, Western Division, 163 F.Supp. 13.

SUMMARY: Negro school children in Little Rock, Arkansas, brought a class action in federal district court against school officials of that city. The action sought a declaration of the rights of the plaintiffs to attend public schools without discrimination on the basis of race or color and an injunction preventing enforcement of the Arkansas constitutional and statutory provisions requiring segregation in public schools. The answer of the defendant school officials conceded the invalidity of those provisions. The school officials presented a plan for the gradual integration of the schools, beginning with the high school grades, over a period of approximately six years, to begin in 1957. The district court approved the plan as a "prompt and reasonable start" toward full integration and retained jurisdiction of the case, without granting an injunction, to supervise implementation of the plan. 143 F.Supp. 855, 1 Race Rel. L. Rep. 851 (E.D. Ark. 1956). On appeal, the Court of Appeals, Eighth Circuit, affirmed. That court distinguished several decisions of other federal courts requiring earlier integration, stating that the factors in each locality must be considered and may vary, and in this case it could not hold that the time allowed was unreasonable. 243 F.2d 361, 2 Race Rel. L. Rep. 593 (1957). Just prior to and at the beginning of the 1957 school term, a number of legal developments occurred culminating in an order of the President sending United States armed forces to restore order and enforce the court's decree. For a chronological treatment of these developments, see 2 Race Rel. L. Rep. 931-65 (1957). On February 20, 1958, the defendant school officials filed a petition in federal district court alleging that the situation created by public opposition to integration and the unrest of pupils, teachers and parents made it difficult to maintain a satisfactory educational program and that educational standards were being impaired. The petition, as amended, requested the court to permit the defendants to suspend the operation of the plan for gradual integration until January, 1961. On June 21, the court, Lemley, J., granted the petition. The court found that the situation was unforeseeable when the plan had been approved and noted that certain 1956-57 legislative enactments of the Arkansas General Assembly pertaining to segregation could not be construed before 1961. Subsequently, the Court of Appeals on August 18, 1958, reversed Judge Lemley's stay order but delayed enforcement of its order to allow further action by the United States Supreme Court. Reproduced below are the school board's petition, the board's amended petition, the district court order granting a stay, the district court order refusing to delay enforcement of its order, the Court of Appeals opinion reversing the district court and the Court of Appeals order delaying enforcement to allow appeal.

Petition By School Board

Petitioners William G. Cooper, Harold Engstrom, Wayne Upton, Dale Alford, Henry Rath and R. A. Lile, as Directors of Little Rock School District, and Virgil T. Blossom, as Superintendent of Little Rock School District, would respectfully show:

1. Following the decision of the Supreme Court of United States in Brown v. Board of

Education on May 17, 1954, the officials of Little Rock School District, hereinafter referred to as "District," who were personally opposed to integration in the public schools, but believed they should fulfill the obligation of their oaths to support the Constitution of the United States as interpreted in said decision, formulated a plan of integration for the District. Said plan envisioned integration over a period of seven years commencing at the high school level in September, 1957. The plaintiffs herein, in behalf of themselves and the class composed of all other Negro pupils residing within the boundaries of the District, were of the opinion that total integration in all schools operated by the District should be accomplished immediately and they filed a suit in this Court asking that said plan be invalidated and the District be required to integrate at all levels without delay. The District offered proof showing that the seven year period, when viewed in the light of existing conditions, was reasonable and in keeping with the "all deliberate speed" concept of the Brown v. Board of Education decision. This Court, on the 15th day of August, 1956, entered a decree approving the said seven year plan.

2. A few months prior to September, 1957, certain persons who opposed integration under any conditions commenced a campaign of opposition to the plan and caused to be brought into Little Rock speakers from other states who sought to create in the minds of the residents of the District hostility toward the plan, contempt for the officials of the District, and a spirit of defiance toward this Court's order.

3. Prior to September 3, 1957, the opponents of integration had made little progress in changing the belief of a large majority of the residents of this District that the plan, although objectionable in principle, was still the best legally obtainable. On September 3, 1957, the Arkansas National Guard, for the stated purpose of preserving the peace, was ordered to surround Central High School, one of the schools operated by the District, which prevented Negro pupils from entering said School. The effect of that action was to harden the core of opposition to the plan and cause many persons who theretofore had reluctantly accepted the plan to believe there was some power in the State of Arkansas which, when exerted, could nullify the Federal law and permit disobedience of the decree of this Court, and from that date hostility to the plan was increased and criticism of the officials of the District has become more bitter and unrestrained.

4. When the Arkansas National Guard was called into service on September 3, 1957, the officials of the District, out of concern for the safety of the Negro pupils who intended to enter Central High School, published a statement in one of the local papers asking that they do not try to enroll, and immediately thereafter asked this Court for instructions as to whether that request should be rescinded. By order entered herein on the 4th day of September 1957, the officials of the District were directed to rescind said request, and they did so. The Negro pupils then sought to enter Central High School but were turned back by the guardsmen on duty.

5. By order of this Court entered on the 20th day of September, 1957, the Governor of the State of Arkansas and certain officials of the National Guard were ordered to withdraw the members of the Arkansas National Guard from Central High School and to cease and desist in preventing Negro pupils from entering that School.

6. Thereafter the Negro pupils again presented themselves for enrollment and large groups of persons formed near the said school and certain members thereof shouted defiance of this Court's order and sought by intimidation to deter said Negro pupils from entering said school. At that point the police force of the City of Little Rock was called into action, but said police force, later believing it was in the interest of said Negro pupils to remove them from said school, escorted them to their homes. The inability of the said police force to disperse the groups which continued to form and to provide safe access to said school for said Negro pupils created in the minds of the opponents of integration a still stronger determination to resist this Court's order and caused many residents of the District who previously had accepted the doctrine of Brown v. Board of Education to question this Court's authority to enforce integration and to believe the officials of the District were voluntarily and for the purpose of fulfilling their personal desires, endeavoring to bring integration into the Schools of the District.

7. Realizing the confusion in the minds of the residents of the District resulting from this sequence of unfortunate events and the impossi-

bility of providing a satisfactory program of education in an atmosphere of turmoil and confusion, the officials of the District, in the interest of all pupils, filed herein a petition asking that this Court postpone temporarily the operation of the phase plan of integration. Said petition was summarily overruled on the 7th day of September, 1957, and a verbal request to this Court to direct the United States Marshal to aid in carrying out the order of this Court was denied.

8. On the 23rd day of September, 1957, the President of the United States ordered federal troops into action, and they commenced patrolling Central High School in order to guarantee safe entry for the Negro pupils. Later the Arkansas National Guard was federalized, the regular army troops were removed (on the 27th day of November, 1957), and at present federalized guardsmen are patrolling the school grounds and preventing interference with the attendance of said Negro pupils.

9. The opponents of integration in the District, in the State of Arkansas and other States are continually implanting in the minds of the residents of the District by all types of inflammatory publicity the idea that a Federal Court order to integrate is a nullity; that the officials of the District are betraying the interests of the residents of the District in adhering to their oaths of office and endeavoring in good faith to comply with the order of this Court; and they are proclaiming that nowhere in the South has a plan of integration been put into effect except where the school officials have supinely acquiesced under the theory that the Federal Courts have the power to compel integration in the public schools. A large majority of the pupils in Central High School have exhibited the highest type of good citizenship in their daily scholastic activities, but a small group, with the encouragement of certain adults, has absorbed the prevailing spirit of defiance and has almost daily created incidents which make it exceedingly difficult for teachers to teach and for pupils to learn. The existing pupil unrest, teacher unrest, and parent unrest, likewise make it difficult for the District to maintain a satisfactory educational program.

10. In Brown v. Board of Education it is stated that one of the factors to be considered in determining when integration should start is the "revision of local laws." Implicit in the opinion of the Supreme Court of the United States is the assumption that States would bow to the ruling and repeal State laws which are in conflict with the new interpretation of the Fourteenth Amendment to the Constitution of the United States. Instead of revising local laws to bring them into conformity with the Federal law, the State of Arkansas has enacted several laws which tend to defy the Federal law and obstruct compliance by the District with the order of this Court.

11. The District now finds itself in a most difficult position in providing satisfactory education for its pupils. It has the responsibility of operating under the phase plan of integration as directed by this Court, and yet it has no power to enforce the provisions of the plan.

12. The present state of affairs is due to several factors:

(a) The Federal Government, except for having placed troops around the school grounds, apparently is powerless to enforce compliance with this Court's order of integration and suppress the interference now being encountered by the officials of the District. Federal officials have not applied penal sanctions to any of the persons who formed into groups near the school grounds, defied this Court's order, and interfered with the plan of integration therein specified. They have stepped aside and placed on the District the full responsibility of compliance.

(b) The Judicial branch of the Federal Government has not aided the District by preventing or attempting to prevent interference with the plan which the officials of the District, in a sense of duty, are endeavoring to apply in the operation of the schools within the District.

(c) There has been no effort on the part of the Congress of the United States to strengthen old, or provide new, judicial procedures which will guarantee enforcement of the civil rights of the Negro minority.

(d) The District, in its respect for the law of the land, is left standing alone, the victim of extraordinary opposition on the part of the State government and apathy on the part of the Federal Government.

13. The principle of integration runs counter to the ingrained attitudes of many of the residents of the District. For more than eighty years its schools have been operated on a basis of segregation, and except for Brown v. Board of Education the question of integration would never have been discussed by the officials of the District. The transition involved in its gradual plan of integration has created deep-rooted and violent emotional disturbances. Any change in the attitudes of the residents of the District will come from educating them as to their obligations as American citizens and a concurrent extension of enforceable civil rights to the Negro minority, but such change will be slow in arriving. In the meantime, the concept of "all deliberate speed" should be re-examined and clearly defined by the Federal Courts, and in the absence of an understanding on the part of its residents as to their obligations to the Federal Government and a strengthening of the Federal Government's powers of enforcement short of the use of federal troops, the District should not be required to submit to unjustifiable persecution of its officials and the destruction of its educational standards by outside interference.

WHEREFORE, Petitioners ask that the plan of integration heretofore ordered by this Court be realistically reconsidered in the light of existing conditions and that in the interest of all pupils the beginning date of integration be postponed until such time as the concept of "all deliberate speed" can be clearly defined and effective legal procedures can be obtained which will enable the District to integrate without impairment of the quality of education it is capable of providing under normal conditions.

WILLIAM G. COOPER
HAROLD ENGSTROM
WAYNE UPTON
DALE ALFORD
HENRY RATH
R. A. LILE
Directors of
Little Rock School District
VIRGIL T. BLOSSOM,
Superintendent of
Little Rock School District

Board's Substituted Petition

May 7, 1958

1. This Petition is filed pursuant to the provisions of Rule 60(b) (5) and (6) of the Federal Rules of Civil Procedure, and as a request for the application of substantive rules of equity.

2. Petitioners William G. Cooper, Harold Engstrom, Wayne Upton, Dale Alford, Henry Rath and R. A. Lile are the duly elected and acting Directors of Little Rock School District; Virgil T. Blossom is the acting Superintendent of Little Rock School District; and Little Rock School District is a governmental agency created by and acting under the laws of Arkansas.

3. Following the decision of the Supreme Court of the United States in Brown v. Board of Education on May 17, 1954, the officials of Little Rock School District, hereinafter referred to as "District," who were personally opposed to integration in the public schools, but believed they should fulfill the obligation of their oaths to support the Constitution of the United States as interpreted in said decision, formulated a Plan of Integration for the District. Said Plan envisioned integration over a period of seven years commencing at the high school level in September, 1957. The plaintiffs herein, in behalf of themselves and the class composed of all other Negro pupils residing within the boundaries of the District, were of the opinion that total integration in all schools operated by the District should be accomplished immediately and they filed a suit in this Court asking that the District be required to integrate at all levels without delay. The District offered proof showing that the seven year period, when viewed in the light of existing conditions, was reasonable and well within the flexible "all deliberate speed" concept of the Brown v. Board of Education decision. This Court, on the 28th day of August, 1956, entered a decree approving the said seven year Plan, said order being in the nature of an in-

junctive order to proceed in accordance with the terms of the Plan.

4. A few months prior to September, 1957, certain persons who opposed integration under any conditions commenced a campaign of opposition to the plan and caused to be brought into Little Rock speakers from other states who sought to create in the minds of the residents of the District hostility toward the Plan, contempt for the officials of the District, and a spirit of defiance toward this Court's order.

5. Prior to September 3, 1957, the opponents of integration had made little progress in changing the belief of a large majority of the residents of this District that the Plan, although objectionable in principle, was still the best for the interests of all pupils in the District. On September 2, 1957, the Arkansas National Guard, for the stated purpose of preserving the peace, was ordered to surround Central High School, one of the schools operated by the District, which prevented Negro pupils from entering said School. The effect of that action was to harden the core of opposition to the Plan and cause many persons who theretofore had reluctantly accepted the Plan to believe there was some power in the State of Arkansas which, when exerted, could nullify the Federal law and permit disobedience of the decree of this Court, and from that date hostility to the Plan was increased and criticism of the officials of the District has become more bitter and unrestrained.

6. When the Arkansas National Guard was called into service on September 2, 1957, the officials of the District, out of concern for the safety of the Negro pupils who intended to enter Central High School, published a statement in one of the local papers asking that they do not try to enroll, and immediately thereafter asked this Court for instructions as to whether that request should be rescinded. By order entered herein on the 3rd day of September, 1957, the officials of the District were directed to rescind said request, and "to integrate in accordance with the Plan approved by this Court the senior high school grades in the Little Rock Public Schools forthwith." The said request was rescinded, and the Negro pupils then sought to enter Central High School but were turned back by the guardsmen on duty.

7. By order of this Court entered on the 20th day of September, 1957, the Governor of the State of Arkansas and the Commanding Officer of the National Guard were ordered to withdraw the members of the Arkansas National Guard from Central High School and to cease and desist in preventing Negro pupils from entering that school.

8. Thereafter the Negro pupils again presented themselves for enrollment and large groups of persons formed near the said school and certain members thereof shouted defiance of this Court's order and sought by intimidation to deter said Negro pupils from entering said school. At that point the police force of the City of Little Rock was called into action, but said police force, later believing it was in the interest of said Negro pupils to remove them from said school, escorted them to their homes. The inability of the said police force to disperse the groups which continued to form and to provide safe access to said school for said Negro pupils created in the minds of the opponents of integration a still stronger determination to resist this Court's order and caused many residents of the District who previously had accepted the doctrine of Brown v. Board of Education to question this Court's authority to enforce integration and to believe the officials of the District were voluntarily, and for the purpose of fulfilling their personal desires, endeavoring to bring integration into the schools of the District.

9. Realizing the confusion in the minds of the residents of the District resulting from this sequence of unfortunate events and the impossibility of providing a satisfactory program of education in an atmosphere of turmoil and confusion, the officials of the District, in the interest of all pupils, filed herein a petition asking that this Court temporarily relieve them of complying with the terms of the Plan. Said petition was summarily overruled on the 7th day of September, 1957. At the same time a verbal request to this Court to direct the United States Marshal to aid in carrying out the order of this Court was denied.

10. On the 23rd day of September, 1957, the President of the United States ordered federal troops into action, and they commenced patrolling Central High School in order to guarantee safe entry for the Negro pupils. Later the Arkansas National Guard was federalized, the regular army troops were removed on the 27th day of November, 1957, and at present federal-

ized guardsmen are patrolling the school grounds and preventing interference with the attendance of said Negro pupils.

11. The opponents of integration in the District, in the State of Arkansas and other States are continually implanting in the minds of the residents of the District, by all types of inflammatory publicity, the idea that a Federal Court order to integrate is a nullity; that the officials of the District are betraying the interests of the residents of the District in complying with the order of this Court; and they are proclaiming that nowhere in the South has a plan of integration been put into effect except where the school officials have supinely acquiesced under the theory that the Federal Courts have the power to compel integration in the public schools. A large majority of the pupils in Central High School have exhibited the highest type of good citizenship in their daily scholastic activities, but a small group, with the encouragement of certain adults, has absorbed the prevailing spirit of defiance and has almost daily created incidents which it exceedingly difficult for teachers to teach and for pupils to learn. The existing pupil unrest, teacher unrest, and parent unrest, likewise make it difficult for the District to maintain a satisfactory educational program.

12. In Brown v. Board of Education it is stated that one of the factors to be considered in determining when integration should start is the "revision of local laws." Implicit in the opinion of the Supreme Court of the United States is the assumption that States would bow to the ruling and repeal State laws which are in conflict with the new interpretation of the Fourteenth Amendment to the Constitution of the United States. Instead of revising local laws to bring them into conformity with the Federal law, the State of Arkansas has enacted several laws which tend to impede the Federal law and obstruct compliance by the District with the order of this Court.

13. The District now finds itself in a most difficult position in providing satisfactory education for its pupils. It has the responsibility of operating under the phase Plan of Integration as directed by this Court, and yet it has no power to prevent interference with the operations of its schools under the terms of the Plan.

14. The principle of integration runs counter to the ingrained attitudes of many of the residents of the District. For more than eighty years its schools have been operated on a basis of segregation, and except for Brown v. Board of Education the question of integration would never have been discussed by the officials of the District. The transition involved in its gradual Plan of Integration has created deep-rooted and violent emotional distrubances. Any change in the attitude of the residents of the District will come from educating them as to their obligations as American citizens and a concurrent extension of enforceable civil rights to the Negro minority, but such change will be slow in arriving. In the meantime, the concept of "all deliberate speed" as applied to this District should be reexamined and in the absence of an understanding on the part of its residents as to the obligation to the Federal Government and a strengthening of the Federal Government's powers of enforcement, short of the use of federal troops, the District should not be required to submit to unjustifiable persecution of its officials and the destruction of its educational standards by outside interference.

15. Petitioners cannot with certainty determine how long operations under the plan should be postponed, but in the light of existing conditions hereinabove mentioned and in the light of conditions as they will probably exist in the foreseeable future, they are of the opinion that a suspension of operations under the plan until January 1961 is reasonable and advisable.

WHEREFORE, Petitioners ask that the orders of August 28, 1956, and September 3, 1957, be modified so as to suspend operations under the plan for such period as may appear proper to this Court.

Opinion and Order Granting Integration Delay

LEMLEY, J.

This cause is now before the Court upon the petition of the defendants, members of the School Board of Little Rock, Arkansas, and the Superintendent of Schools, for an order permitting them to suspend until January, 1961, the operation of the plan of gradual racial integration in the Little Rock public schools, which plan was adopted by the Board in 1955, and was approved by the Court in 1956, the Court of Appeals affirming. Aaron v. Cooper, DC, Ark., 143 F.Supp. 855, aff'd., 8 Cir., 243 F.2d 361. This petition has been tried to the Court and the Court having considered the pleadings, briefs and evidence, and being well and fully advised, doth file this memorandum opinion, incorporating herein its findings of fact and conclusions of law.

[*History of Litigation*]

In order that the issues tendered by the Board's petition may be intelligently understood, a brief history of this litigation is desirable:

Prior to the decisions of the Supreme Court of the United States in the Brown cases (Brown v. Board of Education, 347 U.S. 483, and 349 U.S. 294) the public school system in Little Rock, like all other public school systems in the State of Arkansas, was operated on a racially segregated basis. A few days after the first Brown decision was rendered the Board announced that it was commencing studies looking toward the establishment of an integrated school system; and in 1955, a few days prior to the rendition of the second Brown decision, the Board announced a plan of gradual integration extending over a period of years, the plan to go into operation with respect to the high school grades at the commencement of the 1957-58 school year.[1]

Thereafter, the plaintiffs in this case, who are Negro children of school age residing within the Little Rock School District, commenced a class action against the members of the Board and the Superintendent of Schools attacking the plan. The case was tried by Judge John E. Miller of Ft. Smith, who was sitting in the Eastern District of Arkansas under a special assignment. As indicated, the plan was approved, and the Court dismissed the prayer of the complaint for declaratory and injunctive relief, and retained jurisdiction of the case for the purpose of entering such other and further orders as might be necessary to obtain the plan's effectuation.[2]

[*Majority Opposed*]

At the time the plan was adopted, the Board recognized that the vast majority of the people of Little Rock was opposed to integration, but it was felt by the Board that the plan would be acceptable as the best one obtainable under the circumstances, and that it would be workable if put into operation in September, 1957. As time went on, however, opposition to integration increased in intensity not only in Little Rock but throughout the State as a whole, as is shown by the fact that in the general election in November, 1956, the people of the State by substantial majorities adopted: (a) Amendment No. 44 to the Arkansas Constitution of 1874, which amendment directed the Arkansas Legislature to take appropriate action and pass laws opposing "in every Constitutional manner" the decisions of the Supreme Court in the Brown cases; (b) A resolution of interposition which, among other things, called upon the people of the United States and the governments of all of the separate states to join the people of Arkansas in securing the adoption of an amendment to the Constitution of the United States, which would provide that the powers of the federal government should not be construed to extend to the regulation of the public schools of any state, or to include a prohibition to any state to provide for the maintenance of racially separate but substantially equal public schools within such state; (c) A pupil assignment law dealing with the assignment of individual pupils to individual public schools.

And the 61st General Assembly, which met

1. The plan is set out verbatim and thoroughly discussed in the district court's opinion in Aaron v. Cooper, ***supra.***

2. In the very recent case of Thomason v. Cooper, et al, 8 Cir.,———F.2d———, a phase of this litigation, as will hereinafter appear, the Court of Appeals in construing Judge Miller's decree, said that in effect it ordered the Board to put the plan into operation at the beginning of the 1957-58 school year.

in January, 1957, passed four statutes, one of which established a State Sovereignty Commission; another of which relieved school children of compulsory attendance in racially mixed public schools; the third of which required certain persons and organizations engaged in certain activities, including those affecting integration, to register with and make periodic reports to the State Sovereignty Commission; and the fourth of which authorized local school boards to expend district funds in employing counsel to assist them in the solution of problems arising out of integration.

[*Chancery Court Suit*]

In August, 1957, Mrs. Clyde Thomason, a white person, filed a suit against the Board and the Superintendent in the Chancery Court of Pulaski County, the purpose of which suit was to enjoin them from putting the plan into operation; that suit was based, in part at least, upon the legislation heretofore mentioned. A hearing was held before the Chancellor, and on August 29, 1957, a temporary restraining order was issued. At that time Judge Ronald N. Davies of Fargo, North Dakota, was sitting in the Eastern District of Arkansas under special assignment, and on August 30, upon the application of the Board in this cause, he enjoined further proceedings by the plaintiff in the state court litigation. His decision was appealed, and he was affirmed. Thomason v. Cooper, supra.

The 1957-58 school year was due to commence on September 3, 1957, and the Board had arranged to enroll nine Negro students in the formerly all-white Central High School pursuant to the plan. On the night of September 2, however, the Governor of the State of Arkansas announced that in the interest of preserving the public peace and tranquility he had called out units of the Arkansas National Guard and had directed that the white schools be placed "off limits" to Negro students, and that the Negro schools be placed "off limits" to white students. The Board, learning of the Governor's action, requested the nine Negro students not to attempt to enter the school the following day, and on the morning of September 3, the Board applied to Judge Davies for instructions. As a result of that application Judge Davies entered an order on the same day directing the Board to put its plan of integration into operation "forthwith."

On September 4 the Negro students attempted to enter the school but were turned away by the national guardsmen. The next day the Board filed a petition for a temporary suspension of the operation of the plan, which petition upon a hearing by Judge Davies was denied.

On September 9, 1957, Judge Davies entered an order inviting the Government to come into the case as amicus curiae and to commence injunction proceedings against the Governor and his subordinates "to prevent the existing interferences with and obstructions to the carrying out of the orders heretofore entered by this Court in this case." Thereupon the Government intervened, and after a hearing held on September 20, a preliminary injunction was entered restraining the Governor, the Adjutant General of the State of Arkansas, and the Unit Commander of the guardsmen on duty from "(a) obstructing or preventing, by means of the Arkansas National Guard, or otherwise, Negro students eligible under said plan of school integration to attend the Little Rock Central High School, from attending said school or (b) from threatening or coercing said students not to attend said school or (c) from obstructing or interfering in any way with the carrying out and effectuation of this Court's orders of August 28, 1956 and September 3, 1957, in this case, or (d) from otherwise obstructing or interfering with the constitutional right of said Negro children to attend said school." See Aaron v. Cooper, DC, Ark., 156 F.Supp. 220.

[*Governor Obeys Order*]

The Governor obeyed the order entering the temporary injunction just mentioned, while at the same time prosecuting an appeal therefrom, and withdrew the national guardsmen. Judge Davies' decision in question was affirmed by the Court of Appeals on April 28 of the current year. Faubus et al. v. United States et al., 8 Cir., ——F.2d——. On Monday, September 23, the Negro students entered Central High School under the protection of the police department of the City of Little Rock and of certain members of the Arkansas State Police. A large and demonstrating crowd, however, had gathered around Central High School, which crowd the officers on duty could hardly control, and they advised the Superintendent to remove the Negro children from the school which was done.

A short time later the Negro students were readmitted to the school under the protection of combat troops of the regular United States Army which the President sent into Little Rock for that purpose, and eight of these students remained enrolled for the balance of the school year which closed on May 28, 1958. During the entire school year the grounds and interior of Central High School were patrolled first by regular army troops and later by federalized national guardsmen.

[*Petition for Stay*]

The petition for a stay with which we are concerned was originally filed by the Board on February 20, 1958; that pleading, reduced to essentials, alleged that federalized national guardsmen were on duty at the school and were preventing interference with the attendance of the Negro students, that a small group of students with the encouragement of certain adults had created almost daily incidents making it difficult for pupils to learn and teachers to teach, that there existed unrest among students, parents and teachers which likewise made if difficult for the school district to maintain a satisfactory educational program, and that educational standards were being impaired. The prayer of the original petition was that "the plan of integration heretofore ordered by this Court be realistically reconsidered in the light of existing conditions and that in the interest of all pupils the beginning date of integration be postponed until such time as the concept of 'all deliberate speed' can be clearly defined and effective legal procedures can be obtained which will enable the District to integrate without impairment of the quality of education it is capable of providing under normal conditions." On February 25, 1958, the plaintiffs filed a motion to dismiss the petition on the ground that it stated no claim upon which relief could be granted, and on the further ground that it stated no claim for relief from a judgment or order cognizable under Rule 60(b) of the Federal Rules of Civil Procedure.

Although this case had never been on our docket, due to the fact that at the time there was no other judge regularly commissioned in the Eastern District of Arkansas, and in view of the public interest involved in the Board's petition, the Honorable Archibald K. Gardner, Chief Judge of the Court of Appeals for this Circuit, on April 18, 1958, designated us to hear and determine the issues presented by the petition, "and to do such work as may be necessary and incidental to acting upon said petition." This special assignment was made to run from April 21, 1958, to September 1, 1958, both dates inclusive.

On April 28, 1958, we held a preliminary proceeding in this matter, in the course of which we read a prepared statement, which, among other things, directed that the original petition be amended so as to disclose whether the Board desired time to reconsider the plan, or whether it simply wanted a "moratorium" or a "cooling off period," and also so as to give a reasonable indication of how long a postponement the Board felt that it needed at this time.

Subsequently, the Board filed a substituted petition containing allegations more or less similar to those of its original pleading, and praying that a stay be granted until January, 1961. In that connection, it was alleged: "Petitioners cannot with certainty determine how long operations under the plan should be postponed, but in the light of existing conditions hereinabove mentioned and in the light of conditions as they will probably exist in the foreseeable future, they are of the opinion that a suspension of operations under the plan until January, 1961 is reasonable and advisable."

[*Substituted Petition*]

The plaintiffs filed a response to the substituted petition wherein they renewed their motion to dismiss, on which motion ruling had been reserved at the preliminary proceeding above referred to, and in which they denied that the Board is entitled to the relief sought. In addition, on behalf of the Negro students admitted to the school in September, 1957, it was alleged that their rights to finish their high school education in Central High School have become vested, and that "defendants are without right at law or equity to frustrate said vested rights in this or any other proceeding."

When this matter was called for trial on the morning of June 3, the Board, without objection on the part of the plaintiffs, filed an amendment to the substituted petition alleging more definitely the respects in which it contends that the educational program at Central High School has been impaired due to the alleged situation at Little Rock. It is said in the amendment that the educational program has suffered and will

continue to suffer; that the Board has had to divert funds in an attempt to solve the problems with which it has been faced, which funds would otherwise have been used for normal educational purposes such as teachers' salaries, plant maintenance and new construction; that under the conditions that existed at Central High School during the school year just past, and under the conditions likely to exist in the foreseeable future, both the Negro and the white students have suffered and will continue to suffer unless the requested delay is granted; and that the problems caused by operation under the court orders that have been mentioned have taken and will continue to take "an undue amount of time, talent and energy of school personnel, all of which has been and will continue to be a severe strain on said personnel, and which has prevented and will continue to prevent said personnel from performing many of their regular duties."

While the plaintiffs have not filed any formal pleading directed at the amendment to the substituted petition, we shall treat the amendment as traversed, and will also consider that the plaintiffs' motion to dismiss extends to the same, as well as to the other pleadings filed by the Board.

[*Plan Broken Down*]

It is the theory of the Board, reflected in its pleadings, evidence and briefs, that the plan of integration which it adopted in 1955, upon the assumption that it would be acceptable and workable, has broken down under the pressure of public opposition, which opposition has manifested itself in a number of ways hereinafter mentioned, and that as a result the educational program at Central High School has been seriously impaired, that there will be no change in conditions between now and the time that school opens again in September, 1958, and that if the prayer for relief is not granted the situation with which the Board will be confronted in September will be as bad as, if not worse than the one under which it has labored during the past school year, and that it is in the public interest that the requested delay be granted.

While the plaintiffs deny, at least formally, that the educational standards at Central High School have been impaired, it seems to us that their fundamental position is, that even if it be assumed that everything that the Board alleges is true from a factual standpoint, nevertheless the Board's difficulties stem entirely from popular disagreement with the principle of integration, which disagreement does not form a proper legal basis for permitting the Board to postpone the operation of its plan. This contention is summarized in the plaintiffs' pre-trial brief in the following language: "The defendants' case for suspension of the injunctions is predicated upon problems allegedly created by community oppositions to continued nonsegregation at Central High School. Such an approach is without legal foundation."

In addition, the plaintiffs contend that the Board does not actually stand in need of any relief. As touching the situation inside the school, they urge that the Board could have solved its problems during the year just past had it taken a firmer disciplinary stand, and that if such a stand is taken this fall the problems can still be solved; and they contend still further if a stay should be granted it will be more difficult to put the plan back into effect in 1961 than it would be for the Board to persevere with it this coming year. With regard to the situation outside the school, the plaintiffs argue that the Board's proper remedy is the commencement of criminal proceedings or the seeking of injunctive relief against the persons responsible for the disorders.

[*Conflicting Theories*]

Those conflicting theories present two basic questions for our decision, namely, whether or not this Court, sitting as a court of equity, has the power to grant the relief sought, and, if so, whether or not the Board has made a showing sufficient to justify the granting of that relief. In that connection we might call attention to the fact that in the prepared statement that we read at the preliminary proceeding held on April 28 we took occasion to say, among other things: ". . . let me make it clear that if the Board makes a case for relief under the law and the evidence, then appropriate relief will be granted. But, on the other hand, if the Board fails to make a case, either from a legal or a factual standpoint, its petition will have to be denied."

As to the first question, there can be no doubt that this Court has "jurisdiction," in the sense of "power to act," to grant the relief sought. Such power is to be found in Rule 60 (b) (5) and (6) authorizing a federal court to grant

relief from a judgment when it is no longer equitable for the same to have prospective application, or for "any other reason justifying relief from the operation of the judgment"; and in their response to the substituted petition the plaintiffs admit: ". . . that Rule 60 (b) (5) and (6) empowers the Court to grant, upon such terms as are just, relief from a judgment or order."

[*Inherent Power*]

Aside from Rule 60 (b), jurisdiction to grant relief here may be predicated upon the inherent power of a court of equity with respect to its injunctive decrees. United States v. Swift & Co., 286 U.S. 106, 114-115; Tobin v. Little Rock Packing Co., DC, Ark. 104 F.Supp. 527, aff'd., 8 Cir., 202 F.2d 234, cert. den. 346 U.S. 832. And, more cogently, the existence of such jurisdiction in a case of this kind appears to have been specifically recognized in the second Brown opinion wherein it was said:

> "In fashioning *and effectuating* the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a *practical flexibility* in shaping its remedies and *by a facility for adjusting and reconciling public and private needs.* These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.
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> "While giving weight to these public and private considerations, the courts will require that the defendants make *a prompt and reasonable start* toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts *may find that additional time is necessary to carry out the ruling in an effective manner.* The burden rests upon the defendants to establish that such time *is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date . . .*" Brown v. Board of Education, supra, 349 U.S. at 300, emphasis supplied.

To hold that once a plan of integration has been approved and ordered into effect by a federal court, all of the details of that plan, including the commencing date and the rate of progress toward complete elimination of compulsory segregation, become immutably fixed would negate the concept of equity's "practical flexibility" in shaping its remedies, and would be an unwarranted limitation upon its "facility for adjusting and reconciling public and private needs." And it should be noted in this connection that although in the Arlington County, Virginia case the district judge ordered the Board there involved to commence integration by a certain time and to complete it by a certain time, he expressly reserved the power "to enlarge, reduce, or otherwise modify the provisions of said injunction or of this decree." Thompson et al. v. County School Board of Arlington County, Va., DC, Va., 144 F.Supp. 239, 241, aff'd., 4 Cir., 240 F.2d 59, cert. den., 353 U.S. 910.

[*Board's "Prompt Start"*]

As we approach the second question in this case, it should first be said that it cannot be seriously contended that the Board did not make a "prompt and reasonable start" toward a transition from a racially segregated to a racially integrated public school system. As stated, the Board announced its intention to move in that direction a very few days after the first Brown decision, and it actually announced its plan some days before the second and implementing decision in that litigation; and, in spite of the difficulties that have been outlined, it put the plan into operation and maintained it during the past school year. Hence the real problem is whether or not the Board now needs more time to make the transition "in an effective manner," and whether or not the granting of such time "is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date."

At the hearing on the petition, which extended from June 3, into the afternoon of June 5, the Board called to the stand its president, Mr. Wayne Upton, its Superintendent of Schools, Mr. Virgil T. Blossom, certain members of the administrative staff of the high school, and certain classroom teachers. While the attorneys for the plaintiffs diligently cross-examined the main witnesses called by the Board, they did not put on any proof of their own tending to contradict the factual aspects of the testimony of the Board's witnesses, but confined their evidence to the testimony of two expert witnesses, namely, Dr. Virgil M. Rogers, Dean of the School of Education of Syracuse University, Syracuse, New York, and Dr. David G. Salten, Superintendent of Schools at Long Beach, Long Island, New York. Those witnesses gave it as their opinion in general that to grant the petition would be unnecessary and undesirable, and that the Board should keep its plan in operation while using stricter disciplinary procedures against those in the school who might become involved in racial incidents such as were described by the Board's witnesses; and they also were of the opinion that stricter procedures should have been used during the past session.

[*Presence of Troops Important*]

From the practically undisputed testimony of the Board's witnesses we find that although the continued attendance of the Negro students at Central High School was achieved throughout the 1957-58 school year by the physical presence of federal troops, including federalized national guardsmen, nevertheless on account of popular opposition to integration the year was marked by repeated incidents of more or less serious violence directed against the Negro students and their property, by numerous bomb threats directed at the school, by a number of nuisance fires started inside the school, by desecration of school property, and by the circulation of cards, leaflets and circulars designed to intensify opposition to integration. Mr. J. O. Powell, the vice-principal for boys at the high school, summed the situation up by saying that the first year of operation under the plan was one of "chaos, bedlam and turmoil" from the beginning.

The incidents and other matters just referred to, plus the presence of the troops, which was in and of itself a distracting influence, created throughout the year a situation of tension and unrest among the school administrators, the classroom teachers, the pupils, and the latters' parents, which inevitably had an adverse effect upon the educational program; and we find that said program was seriously impaired, that the orderly administration of the school was practically disrupted, and that educational standards have suffered. We further find that unless a stay is granted, the same situation will prevail when school opens in September, and that the impairment of the educational program and standards will continue, and will probably grow worse.

Before discussing further the adverse effect of the events that transpired during the past school year, we desire to point out that the Board and the school administration had no authority over individuals or groups outside the school, and while they undertook to handle and control the situation within the school by the employment of normal disciplinary procedures, they were unable to do so because of the nature and source of the opposition to integration both inside and outside the school.

[*Not Student Violence*]

It is important to realize, as is shown by the evidence, that the racial incidents and vandalism which occurred in Central High School during the past year did not stem from mere lawlessness on the part of the white students in the school, or on the part of the people of Little Rock outside the school; nor did they stem from any malevolent desire on the part of the students or others concerned to bomb the school, or to burn it down, or to injure or persecute as individuals the nine Negro students in the school. Rather, the source of the trouble was the deep seated popular opposition in Little Rock to the principle of integration, which, as is known, runs counter to the pattern of southern life which has existed for over three hundred years. The evidence also shows that to this opposition was added the conviction of many of the people of Little Rock, that the Brown decisions do not truly represent the law, and that by virtue of the 1956-57 enactments, heretofore outlined, integration in the public schools can be lawfully avoided.

In this connection, the president of the Board, Mr. Upton, testified that between the spring and fall of 1957 there was a marked change in public

attitude towards the plan, that persons who had formerly been willing to accept it had changed their minds and had come to the conclusion "that the local School Board had not done all it could do to prevent integration, and that we didn't have to have integration" and Vice-principal Powell testified that he believed that the white children involved in the incidents "feel that they are morally correct in their attitude and in their opposition," and that such is due to the "cultural patterns and sociological patterns in this community for many years," and that the students who created the incidents felt that it was wrong to integrate the Negro children into Central High School.

[*Opposition Stiffens*]

With respect to the effects of the 1956 constitutional amendment and initiated acts and of the 1957 statutes, Mr. Blossom testified that those enactments had their effect at Little Rock and throughout the State in stiffening opposition to the plan and in persuading people that there was no necessity for integration at this time.

Mr. Blossom further testified that the opposition to integration and the feeling that it was not required at this time had been greatly strengthened by numerous newspaper articles and advertisements, and by circulars and cards distributed in Little Rock, copies of which were introduced in evidence. Without prolonging this opinion by undertaking to abstract or quote from individual exhibits, we may say that we agree with Mr. Blossom's appraisal of their effect. Those exhibits, in general, condemn the principle of integration; some of them condemn the Board and the Superintendent for alleged precipitateness in adopting the plan, and for their alleged mistreatment of white students during the past year; and many of them emphasize the idea that integration can be avoided by legal, constitutional means.

Regardless of the merits of the sociological and legal views' expressed in those exhibits, the conclusion is inescapable that they are shared, in whole or in part, by a majority of the population of Little Rock, representing a cross section of the people of that city. On that point, Mr. Upton was asked in the course of his examination whether or not the people who had raised with him the questions which we have previously mentioned were fairly intelligent people, and he replied that they were, and that they were generally people who recognized him and who knew him. And Mr. Blossom expressed the opinion that the doubts and questions in the minds of many people were honest ones, and that it was his opinion that the great majority of the people of the community, from the contacts he had had with it, do not favor integration.

[*State Litigation*]

With further reference to the 1956-57 enactments it should be said that at least some of them are now involved in litigation pending in the state courts and after that litigation is decided by the trial courts, appeals will doubtless be taken to the Supreme Court of Arkansas, which alone can finally and authoritatively construe the same, and can, in the first instance, pass upon their validity; after the Supreme Court of Arkansas has ruled, those matters may well be carried to the Supreme Court of the United States for final review, all of which will take time. On that subject Mr. Blossom testified: "If you take the suits that are now pending and recognize the ones that are now being proposed, and none of them have been cleared out, the opinion that I would have would be that there are many, many months ahead before there will be any decision on them, to where there is a clear-cut situation between the state and federal law on this problem, and that, in itself, creates this dilemma. You don't know where you are."

[*Effect on Students*]

Getting back to the effects of the events of the past school year on the educational program at Central High School, we find more specifically that those events have had a serious and adverse impact upon the students themselves, upon the class-room teachers, upon the administrative personnel of the school, and upon the overall school program. In addition, said events have cast a serious financial burden upon the school district, which it has had to meet at the expense of normal educational and maintenance functions.

As far as the students themselves are concerned, we think it obvious that the incidents and conditions that have been described could not have been good for them emotionally; but aside from that, their education has certainly suffered and under existing conditions will continue to suffer, as is shown by the testimony of the classroom teachers called by the Board.

For example, Mr. W. P. Ivey, who has taught

mathematics in the Little Rock School district for 34 years and who has been on the faculty of Central High School ever since that school was opened in 1927, testified that the presence of the Negro students created a tension on the part of both students and teachers that was noticeable every day, and that this tension impaired his ability to teach and the receptivity of his students. On cross-examination he stated that the final results obtained by him in his classes were not as good as they had been in prior years, as evidenced by his tests and also by comparison of the grades made in his classes which included Negro students with the grades made in his classes not attended by any of the Negroes.

[*Effect on Standards*]

Another member of the faculty who described the adverse effect that the presence of the Negro students, and all that went with it, had on educational standards was Mrs. Govie Griffin, who has taught chemistry for 13 terms at Central. The subject that she teaches is an elective course, taken principally by those who plan to go to college and who presumably are interested in mastering the subject. It was her observation that the presence of the troops in the school, their standing outside of class-room doors during recitations, and their actions in walking up and down the halls, occasionally dropping their clubs, all had a disturbing effect on pupils and teachers alike. Due to that situation and the prevailing tension and unrest, the amount of subject matter that she was able to offer in her chemistry course was so seriously curtailed that she had to request that standard achievement tests usually given at the close of the school year be not given; and her request was granted. She said in this regard: "In the past we have always given standardized tests at the close of the school year, and the pupils have always been far above the national norm. This year I requested they not be given the test in all fairness to the students because we had not covered the material we had in the past years."

As to the effect of the events of the past session on the classroom teachers and administrative staff personally, the observations and experiences of Mrs. Elizabeth Huckaby, vice-principal for girls, who has been at Central since 1930, are informative. She stated that normally in addition to her administrative duties she taught two English classes, but that during the past year she has been compelled to give up those classes and to devote all of her time to administrative duties, and that from 75 to 90 percent of her time was devoted to problems created by integration. These problems, and the unrest and tension in the school had an adverse effect upon her nerves and physical well being. She testified that apprehension over existing conditions caused her to lose sleep, which problem she had never had before; that she had no social life because of her exhaustion at the end of each day, and that on week ends she and her husband would go to the country and relax, and that by noon on Sunday she "would begin to revive enough to face the next week." Mrs. Huckaby also observed that other teachers were likewise suffering ill effects; she stated that some would come to her trembling, and that others would come weeping because of the events that were transpiring, and she pointed out in this connection that teachers in the main are not accustomed to violence.

Mrs. Huckaby's testimony as to the effect of the integration problems on the classroom teachers was corroborated by that of Mrs. Margaret Ryman, a mathematics teacher, and of Mrs. Shirley Stancil, a guidance counsellor, and likewise by the testimony of Mr. Blossom. The latter stated that one of his greatest concerns during the year was the health and welfare of the teachers, and that he felt very strongly that the teachers were under more strain than the students since they had upon their shoulders the responsibility for the physical welfare and educational progress of every student in the school, and that "they took that responsibility to heart and it affected many of them and that was reflected in many of the conferences I had with them as individuals."

[*Distracted by Calls*]

The tension and strain to which the administrative staff were subjected did not terminate with the close of the school day. Mr. Powell stated that on a typically difficult day his phone would commence ringing as soon as he got home from school, the calls coming from people desiring various types of information; that he has spent as much as three hours on certain days "answering the telephone, or in making calls or dodging calls;" that he has had to work long hours during the evenings and nights on many

occasions, and that his social life and normal rest had been interfered with to a definite extent during the entire school year.

Along the same lines Mr. O. W. Romine, Director of School Plant Services for the entire school district, testified that under normal conditions he worked from eight in the morning until five in the afternoon, and that after hours' duty was rare. During the past year, however, he had been on call 24 hours a day, and had received hundreds of calls at all hours of the night; on many occasions when his telephone had rung, and he had picked up the receiver, he found no one on the line. At one stage of the troubles he was away from home so much at night that he did not see his youngest child for four days, since he would get in at night after the child had gone to bed and would be gone in the morning before the child awoke.

The subject matter of some of the exhibits introduced by the Board consisted, in part at least, of personal attacks on the Board members and the administrative staff, which could not have failed to have reacted unfavorably upon them personally. In addition, Mr. Blossom was the recipient of many threats against his physical safety and well being. Of the Board members, Mr. Upton, at least, was subjected to much personal harassment, mainly by telephone calls, and to such an extent that he had to take an unlisted number.

[*Loss of Efficiency*]

It is too clear to require discussion that the experiences of the classroom teachers and of the administrative staff must have produced at least some loss of personal efficiency on their part, with corresponding damage to the educational program. More serious, however, is the fact that it has been necessary to divert the time and talents of the trained administrative personnel from their normal duties in dealing with the many complex problems involved in the operation of a high school like Central to purely disciplinary matters; and we find, as alleged by the Board, that the efforts of the administrative staff to cope with the integration problems with which they have been confronted have consumed an undue amount of their time and energy; and we agree with Mr. Blossom in his statement that the diversion of administrative skills and energies to discipline maintenance during the past year may have been one of the highest prices that the school district has had to pay. At least one serious result of such diversion is that the curriculum planning which had been previously emphasized at Central, has been seriously impeded. In addition, the building program has been held up although the District's enrollment is rapidly increasing, with an accompanying need for more facilities.

[*Financial Burden*]

As stated, the evidence further showed that the school district has had to shoulder substantial financial burdens on account of integration, and that this has been at the expense of other school programs. Mr. Romine testified, for example, that it was necessary to employ five additional night watchmen at the high school and that the cost for this item alone was between nine and ten thousand dollars; further, when it became necessary to relieve Mr. Powell and Mrs. Huckaby of their teaching duties so that they could devote their energies to the administrative problems with which the school was confronted, substitutes had to be hired to take their places in the classrooms. Moreover, the Board had to spend money to repair the damages to the school property, and to replace locks which had to be cut off of lockers during bomb searches; on that point Mr. Romine said that at one time he saw a bushel basket full of cut locks, and that it cost the Board $1.25 apiece to replace them. Mr. Romine further testified that the overall maintenance budget for all the schools in the district for the fiscal year ending June 30 of the current year was $123,000, that by January of this year he saw that unless something was done that budget would be overrun by approximately $17,000. In order to stay within the budget it was necessary he said to dismiss the paint crew of five men, thus saving not only their wages but also the cost of the paint they would have used, and to forego some normal maintenance work on the school properties.

[*Fund Limitation*]

Mr. Blossom testified that the funds of the Little Rock School District are not unlimited, that in fact the district is underfinanced, and the annual expenditure per child is approximately $100 below the national average. He further pointed out that whenever district funds have to be diverted to meet unusual problems as they were during the past year, the district suffers harm, and that such diversions may mean that

less teachers can be employed, and less instructional equipment purchased.

Looking toward the approaching school term it was the consensus of opinion on the part of the Board's witnesses, and we find, that there has been no softening of the public attitude in Little Rock toward integration, and we further find, as heretofore stated, that unless some relief is granted the Board the conditions that will prevail in Central High School during the 1958-59 school year will be as bad as they were during 1957-58, and will probably deteriorate still further. One reason for this conclusion is that, according to the evidence, Central High School operated last year largely on a momentum that had been built up during past years, and that momentum is running down. Any efficient organization, manned by skilled personnel, as was Central High School in September, 1957, can operate for a time on its momentum even in the face of severe pressure; but with such pressure a time comes when that momentum is lost, and when that happens then, unless the pressure is removed, the organization breaks down. We are convinced that such point is being approached at Central. Mr. Blossom stated in that connection that the strain of the past year had already taken its toll, and would be felt still further when school opens this fall, and that starting into another year would be entirely different from the commencing of school last September. In this he was corroborated by Mrs. Huckaby.

[*Military Assistance*]

We further find that if the attendance of Negro students at Central High School is to be maintained during the next school year, the Board will have to have military assistance or its equivalent, and it is financially unable to bear the expense of hiring a sufficient number of guards to control the situation. It cannot be expected that the Little Rock Police Department will be in a position to detail enough men to afford the necessary protection.

As to the need for troops when school reconvenes, Superintendent Blossom stated that he saw nothing to indicate that conditions at the school would be different in September than they were throughout the past year, and that as a school administrator he saw no lessening of responsibility for the safety of everyone concerned; he said, "We have that responsibility just as greatly today as we did yesterday, and we will have it tomorrow." And when asked whether or not it would be necessary to have the same guards and civilian security employees in the school in September, he replied: "As I said before, I have no reason to anticipate anything different from what we had. If we take what history teaches us, I think that will be a natural conclusion."

[*Troops Disruptive*]

Now, while troops can disperse crowds, and can keep the Negro students physically within the school, and while it is possible that if troops were deployed in sufficient numbers all over the school vandalism could be checked, the presence of troops cannot reduce or eliminate racial tensions, or create a climate that is conducive to education; on the contrary, the presence of armed soldiers in a school is, as has been shown here, disrupting to the educational process. As to the importance of a proper educational climate, Mr. Blossom said: ". . . any educational program needs to have certain things present in the atmosphere, such as a climate where children can be taught and teachers can teach. We have contended that that condition has not existed at Central High School, that it is not likely to exist next year. Now, in putting on any educational program, the proper conditions are about as necessary as the proper tools and the proper teachers." Furthermore, when Mrs. Huckaby was asked on cross-examination if she did not think that the Board, the school administration, the city authorities, and the military could carefully plan the running of the high school, she replied that she did not relish the idea of having those particular groups always involved in her educational system, because as an educator such was foreign to her experience.

As has been said, there can be no question that the Board made a prompt and reasonable start toward compliance with the principles laid down in the Brown cases; thereafter, it put its plan into operation and has adhered to it in good faith in the face of great difficulties. Now, it has come here seeking relief only after it has been confronted with what is, from an educational standpoint, an intolerable situation, and it does not ask for an abandonment of its plan nor does it attempt to obtain an indefinite postponement. It is simply requesting a tactical de-

lay. We are convinced that in seeking this delay the Board is still acting in good faith, and, upon the showing that has been made, we are satisfied that the Board needs more time to carry out its plan in an "effective manner," and that to grant the instant petition is in the public interest, and is consistent with good faith compliance, at the earliest practicable date, with the principles above mentioned. In reaching this conclusion we are not unmindful of the admonition of the Supreme Court that the vitality of those principles "cannot be allowed to yield simply because of disagreement with them;" here, however, as pointed out by the Board in its final brief, the opposition to integration in Little Rock is more than a mere mental attitude; it has manifested itself in overt acts which have actually damaged educational standards and which will continue to do so if relief is not granted.

[*"Effective Manner" Discussed*]

We have seen that the Supreme Court said in the second Brown decision that the transition of a formerly segregated school to a school free from compulsory segregation should be carried out in an "effective manner," and that such a transition is in the public interest. In our estimation a transition which impairs or disrupts educational programs and standards, and which will continue to do so, is not in the public interest, but, on the other hand, inflicts irreparable harm upon all of the students concerned, regardless of race. Where, as here, such a transition is being undertaken under the compulsive effects of a federal court order, a refusal to modify such order so as to ameliorate the situation would in our opinion under the circumstances here present be inequitable, if not arbitrary as well.

[*Necessity for Keeping Standards*]

That the Supreme Court recognized the necessity of maintaining educational standards is evidenced by the following language in the first Brown decision:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. . ." (Brown v. Board of Education, supra, 347 U.S. at 493).

And Judge Miller, in his original opinion in this case, pointed out that the Board was undertaking not only to work out a program of integration, but also to preserve and improve educational standards; and he took occasion to say: "(The Board) must consider the personal rights of all qualified persons to be admitted to the free public schools as soon as practicable on a nondiscriminatory basis. The public interest must be considered along with all the facts and conditions prevalent in the school district. Educational standards must not be lowered. . . ." (Aaron v. Cooper, supra, 143 F. Supp. at 864-865.) Furthermore, the Court of Appeals in its affirming opinion said: ". . The schools of Little Rock have been on a completely segregated basis since their creation in 1870. That fact, plus local problems as to facilities, teacher personnel, the creation of teachable groups, the establishment of the proper curriculum in desegregated schools and at the same time the maintenance of standards of quality in an educational program may make the situation at Little Rock, Arkansas, a problem that is entirely different from that in many other places." Aaron v. Cooper, supra, 243 F.2d at 364.

The importance of maintaining educational standards today is certainly no less than it has been in prior years; in fact it is more urgent. And while the Negro students at Little Rock have a personal interest in being admitted to the public schools on a nondiscriminatory basis as soon as practicable, that interest is only one factor of the equation, and must be balanced against the public interest, including the interest of all students and potential students in the district, in having a smoothly functioning educational system capable of furnishing the type of education that is necessary not only for successful living but also for the very survival of our nation and its institutions. There is also another public interest involved, namely, that of eliminating, or at least ameliorating, the unfortunate

racial strife and tension which existed in Little Rock during the past year and still exists there.

When the interests involved here are balanced, it is our opinion, in view of the situation that has prevailed and will in the foreseeable future continue to prevail at Central High School under existing conditions, the personal and immediate interests of the Negro students affected, must yield temporarily to the larger interests of both races.

[*"Speed" Not Defined*]

While we do not seek at this time to authoritatively define the term "all deliberate speed" employed by the Supreme Court in the Brown case, it does seem to us that the term is a relative one, dependent upon varying facts and circumstances in different localities, and that what might be "deliberate speed" under one set of circumstances could constitute headlong haste under another. And it further appears to us that said term involves the idea of a progress toward the elimination of compulsory segregation that is consistent with the maintenance of sound educational standards and a salutary educational atmosphere, neither of which can be maintained at Central High School if the Board is compelled to keep its plan in operation at this time. After all, the function of any public school system, whether integrated or not, is to educate people.

It is important to realize that to grant the stay requested by the Board will not deprive any Negro student of a good high school education. In 1957 the completely new and up-to-date Horace Mann High School for Negroes was put into operation, and in that school, apart from any question of integration, the Negro students can receive an education equal to that provided in Central High School. As to the Horace Mann School, Mr. Blossom testified that, relatively speaking, the quality of education in that school, measured by any desired indicia, whether facilities, teacher preparation, teaching aids, or instructional supplies, is "on a par with any other school." He further stated with reference to the past session: "The truth of the business is it was better than most high schools in this State, white or colored." He also testified that he felt that the Negro students could in 1958 "be better educated in another manner without them being hurt."

[*No Yielding to Violence*]

The granting of the Board's petition does not, in our estimation, constitute a yielding to unlawful force or violence, but is simply an exercise of our equitable discretion and good judgment so as to allow a breathing spell in Little Rock, while at the same time preserving educational standards at Central High School.

At one point in his testimony Mr. Blossom stated, and we agree with him, that a tactical delay is not the same as a surrender; and the delay here sought is not a vain thing or a mere frustration of the plaintiffs' rights. In the first place, the delay, in and of itself, may well be of material value to the Board in carrying out its announced purposes. In the two and one-half year period involved tempers will have a chance to cool down, emotions may subside to some extent, and there may also be changes in some of the personalities involved in the dispute. Of more significance, however, is the fact that the delay will afford time for the completion of the pending litigation in the state courts and for an appraisal of the results of that litigation. Obviously, should the state legislation challenged in that litigation be upheld as valid, such a result might well have a profound effect on the situation at Little Rock. On the other hand, should that legislation be held unconstitutional, and particularly if such a result should be reached by the state courts, the people of Little Rock might be much more willing to acquiesce in integration as contemplated by the plan.

[*Two Years To Litigate*]

What has just been said likewise indicates that the length of the proposed stay is reasonable, and we so find. On this point we agree with the opinion expressed by Mr. Upton, who is an experienced lawyer, that it will take at least two years for the litigation above referred to be finally terminated. In addition to that, considering the nature of the problem, two and one-half years is not a very long period of time; and a very short delay would serve no useful purposes. Added to those considerations is the fact that the Board and the Superintendent, who are familiar with the problem and whose responsibility it was in the first instance to decide how long a stay was desired, after considering the various factors involved determined on a two and one-half year period, and deemed it desirable to resume the plan at mid-term of the 1960-

61 school year. And we do not believe that under the circumstances the Court should disturb their judgment, even if it were inclined to do so.

In their brief in support of their motion to dismiss the original petition the plaintiffs cited a number of cases [3] standing for the proposition that an injunction may not be dissolved or modified in the absence of a showing of unforeseeable changes in conditions which have created an exceptional situation. While none of those cases involved any problem of race relations or school integration, we do not quarrel with the general rule laid down therein, and the Board in its brief in opposition to the motion concedes "that the situation must be 'extraordinary' and that the circumstances must be 'exceptional.'"

Here, however, there has been a very radical change of situation since the former orders of this Court were entered, the occurrence and extent of which were not, to our mind, foreseeable at that time. And the situation with which the Board is now confronted is certainly exceptional and extraordinary if not, indeed, unique, that situation being complicated by the vast amount of publicity that has been given to it.

[*Statutes Intervene*]

It must be remembered that when Judge Miller handed down his decision in 1956, the people of Arkansas and the legislature had not adopted the measures that we have mentioned; on the contrary, the 1955 legislature had refused to enact certain similar legislation. And when Judge Davies on September 3, 1957, ordered the Board to put its plan into effect forthwith, and when he denied the Board's application for a stay on September 7, and when he entered his order of September 20 enjoining the Governor from further interfering with the operation of the plan, the Negro students had not begun attending classes at the school, federal soldiers had not appeared upon the scene, repeated racial incidents had not occurred, the teachers had not been frightened and demoralized, and educational standards had not been impaired. All of this has taken place since the final order entered by Judge Davies, and we do not believe that he foresaw the result that has come about. On the contrary, in his findings of fact and conclusions of law in connection with the injunction against the Governor he took occasion to refer to the history of peaceful race relations in Little Rock, and to state that prior to the calling out of the Guard the "faculty and the white student body at Central High School were prepared to accept the 9 colored children as fellow students." Aaron v. Cooper, DC, Ark., 156 F.Supp. at 224.

[*Plaintiff's Position*]

As we have said, the fundamental position of the plaintiffs in opposing the petition appears to be that popular opposition to the plan, resulting in obstructions to its orderly operation, does not form any legal basis for affording the Board any relief in this case. In support of that argument counsel for the plaintiffs have cited the following cases: Allen v. County School Board of Prince Edward County, Va., 4 Cir., 249 F.2d 462, cert. den., 2 L.Ed2d 530; Orleans Parish School Board v. Bush, 5 Cir., 242 F.2d 156, cert. den., 352 U.S. 921; Jackson v. Rawdon, 5 Cir., 235 F.2d 93, cert. den., 352 U.S. 925; Mitchell v. Pollock, DC, Ky., 1 Race Rel. L. Rep. 1038; School Board of Charlottesville, Va. v. Allen, 4 Cir., 240 F.2d 59, cert. den., 353 U.S. 910; and School Board of Newport News, Va. v. Atkins, 4 Cir., 246 F.2d 325, cert. den., 355 U.S. 855.

Those cases unquestionably hold that a school board is not justified in failing to make a prompt and reasonable start toward the elimination of compulsory segregation merely because of popular opposition to such a step. But none of them has involved a situation like the instant one where a board has made a prompt and reasonable start, and has actually put its plan into operation, only to find it break down in practice with a consequent impairment of educational standards and demoralization of the faculty and student body.

3. Klapprott v. United States, 335 U.S. 601; Ackermann v. United States, 340 U.S. 193; United States v. Swift & Co., supra, 286 U.S. 106; Walling v. Harnischfeger Corporation, DC, Wis., 142 F.Supp 202, aff'd., 7 Cir., 242 F.2d 712; John E. Smith's Sons Co. v. Lattimer Foundry & Machine Co., 3 Cir., 239 F.2d 815; Federal Deposit Ins. Corp. v. Alker, 3 Cir., 234 F.2d 113; Smith v. Kincade, 5 Cir., 232 F.2d 306. Morse-Starrett Products Corp. v. Steccone, 9 Cir., 205 F.2d 244; Elgin National Watch Co. v. Barrett, 5 Cir., 213 F.2d 776; Bigelow v. Twentieth Century-Fox Film Corp., 7 Cir., 183 F.2d 60; Coca Cola Bottling Co. v. Standard Bottling Co., 10 Cir., 138 F.2d 788; United States v. Besser Manufacturing Co., DC, Mich., 125 F.Supp. 710; Sunbeam Corporation v. Charles Appliances, DC, N.Y., 119 F.Supp. 492.

It is one thing to say that a school board must make a start in the direction of integration without regard to public feelings on the subject, as Judge Hutcheson said in Jackson v. Rawdon, supra; but it is quite another thing to say that when a school board has had the experiences with its plan which the Little Rock Board has had, and when, after observing the results of that plan in operation, it comes into federal court seeking not to abandon the plan or to lay it aside indefinitely, but merely a moratorium, the court must close its eyes and ears to the practical problem with which such board is confronted. Such a judicial attitude would be most unrealistic.

[*Segregated 80 Years*]

If popular feelings and attitudes are utterly and at all times irrelevant to the question under consideration, the Court of Appeals in affirming Judge Miller in this case would hardly have stopped to point out that the Little Rock schools had been segregated for over 80 years; nor would there have been any occasion for the Court of Appeals to say in the New Orleans case that once a school board has accepted the principle laid down in the Brown decisions, it may well be entitled to "time for such reasonable steps in the process of desegregation as appears to be helpful in avoiding unseemly confusion and turmoil." Orleans Parish School Board v. Bush, supra, 5 Cir., 242 F.2d at 166.

Plaintiffs have also cited Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579; Ex parte Endo, 323 U.S. 283; Morgan v. Virginia, 328 U.S. 373; and City of Birmingham v. Monk, 5 Cir., 185 F.2d 859, cert. den., 341 U.S. 940. Those cases hold that ordinarily enforcement of individual constitutional rights will not be delayed because of the public interests opposed to them, and that the State cannot deprive one of a constitutional right through the exercise of the police power. None of those cases, however, was a school integration case, and, as has been pointed out, the second Brown decision itself recognizes the propriety of delay in school integration under proper circumstances.

In the instant case it is not denied that under the Brown decisions the Negro students in the Little Rock District have a constitutional right not to be excluded from any of the public schools on account of race; but the Board has convincingly shown that the time for the enjoyment of that right has not yet come. That showing applies to the Negro students who were in the school last year as well as to others. While the plaintiffs contend that the rights of the students last mentioned have become vested, no authority in support of that proposition has been cited to us, and we know of no such authority, and we do not believe that such contention can be sustained.

[*New Yorkers Testify*]

In support of their argument that if the Board had used sufficiently firm disciplinary measures it could have controlled the situation within the school, and that by such measures it can reestablish control this coming year, the plaintiffs called to the stand the two New York educators heretofore mentioned, and their opinion evidence was in line with the plaintiffs' contentions. On the other hand, the testimony of Mr. Blossom and of Mr. Upton was to the effect that the Board had diligently sought to preserve discipline, that it had expelled a few students and had suspended others for various periods of time, that it had undertaken to consider each case on its own merits and the effect of the action to be taken not only upon the individual child concerned but also upon the other students in the school. It was the opinion of those witnesses that in view of the unusual situation with which they were confronted and of the source and nature of the opposition with which they were faced conditions would have been made worse rather than better by the employment of harsh disciplinary measures such as mass expulsions, and that the course that had been in fact pursued was the best possible one under the existing circumstances.

While Dr. Rogers and Dr. Salten are doubtless well qualified to express opinions as to how school matters should be handled in areas of the country with which they are familiar and in which they have had experience, neither of those gentlemen has had any public school administrative experience in the South, or any personal familiarity with the Little Rock situation; nor has either of them ever had any experience with the problems involved in the transition from segregation to integration in a state where the former has been the accepted and traditional mode of life of the people and where its existence in the public schools has had the sanction of law for so long as those schools have

existed. As regards Dr. Rogers in particular, his qualifications to speak on this subject were seriously impaired, in our eyes, by his suggestion that members of the student body at Central High School might have been used, in effect, as spies upon other students there. In view of these limitations upon the qualifications of the plaintiffs' witnesses, we cannot accept their opinions in preference to that of Mr. Blossom, who is also an expert, and who formed his opinion on the ground and has based it upon his own intimate experience with the problem.

[*Vice-Principal's Authority*]

It is true that the views of Vice-principal Powell coincide with the opinions of the plaintiffs' experts, as far as the situation inside the school is concerned; but it must be remembered that Mr. Powell had no ultimate disciplinary authority and no responsibility for any matters of overall policy; he was a subordinate employee and it was not shown what qualifications, if any, he possesses as an expert in public school administration. He testified that he graduated from Central High School in 1940, that he was employed at the school in an undisclosed capacity in 1952, and that he has been vice-principal for boys for the past three years. His training and experience between 1940 and 1952 were not brought out in the evidence. It is also interesting to note in this connection that Mr. Powell's counterpart, Mrs. Huckaby, did not feel that the employment of stern disciplinary measures was the key to the problem. Actually, it occurs to us that Mr. Powell may well have been so close to the situation in all of its personally unpleasant aspects, that he has to some degree lost his sense of perspective in the matter.

In addition to all of the foregoing, it is well to keep in mind that the duty of maintaining discipline in the schools and of deciding what disciplinary steps would be taken is primarily the function of the school administration, and not that of the Court; and we would certainly be unwilling to substitute our judgment as to what should have been done for that of the Board in the absence of a showing that the Board had erred to such an extent as to indicate an absence of good faith on its part. There has been no such showing here.

[*Hoxie, Clinton Cases*]

Relative to interference from outside the school the plaintiffs urge that the Board should have either instituted criminal prosecutions against the persons responsible, or that it should have applied for injunctive relief, as was done in the Hoxie, Arkansas, and Clinton, Tennessee, cases. See Hoxie School District No. 46 of Lawrence County v. Brewer, DC, Ark., 137 F.Supp. 364, aff'd., 8 Cir., 238 F.2d 91; and Kasper v. Brittain, 6 Cir., 245 F.2d 92, cert. den., 2 L.Ed2d 46. In answer to that argument Mr. Blossom testified, and he was corroborated by Mr. Upton, that the Board had determined as a matter of judgment not to resort to criminal prosecutions or to seek injunctive relief; that it was not the function of the Board to prosecute people or to seek injunctions but to run a school system, and that it had already had all of the litigation that it wanted and was not anxious for any more.

We think that the Board acted within its competency in coming to that conclusion, and we do not think that its failure to commence criminal actions or to seek injunctive relief should militate against its present petition. In the first place, the Board is not charged with the duty of commencing criminal prosecutions or of enforcing the criminal laws of the State. Secondly, by reason of the nature, source and extent of the opposition to integration in Little Rock, actions by the Board looking toward criminal prosecutions or injunctions might have aggravated rather than eased the situation. Moreover, the Board might have had a good deal of difficulty in identifying the persons causing the trouble or in establishing that their conduct constituted crimes or was of such quality as would justify the granting of injunctive relief.

[*Situations Not Comparable*]

As far as the Hoxie and Clinton cases are concerned, Mr. Blossom testified, and we agree, that the situation at neither of those places was comparable to the situation that has existed and now exists in Little Rock. Both Hoxie and Clinton are much smaller places than Little Rock; hence, the procedures followed in the former places might not be effective in the latter.

As an illustration of the differences in situation just mentioned, attention is called to the fact that Judge Reeves' opinion in the Hoxie case discloses that the total integrated student body at Hoxie was 1025, of which only 25 students were Negroes, whereas Judge Miller's opinion in this case shows that the percentage of Negroes

to whites in the high school grades at Little Rock, as of May, 1956, was .229, such percentage in the junior high grades was .246, and in the elementary grades .262, the overall percentage being .252. Moreover, Judge Reeves' opinion also makes clear that the educational facilities for Negroes at Hoxie were by no means comparable to those available to the white students, which is not the case at Little Rock.

As to the Clinton, Tennessee, case, we take judicial notice of the fact that Clinton is a small town located in the mountainous country of eastern Tennessee where there are very few Negroes. In addition, the trouble there was readily traceable to one individual from outside the State, as is shown by the evidence in this case and by the opinion of the Court of Appeals in Kasper v. Brittain, supra.

It being in the public interest, including the interest of both white and Negro students at Little Rock, that we have a peaceful interlude for the period mentioned, an order is being entered permitting the Board to suspend the operation of its said plan until mid-semester of the 1960-61 school year, without the Board, or the individual members thereof, or the Superintendent of Schools being considered in contempt of this Court; and the Court retains jurisdiction of this cause for such other and further proceedings as may hereafter become necessary or appropriate.

THIS the 20 day of June, 1958.

ORDER

LEMLEY, J.

On this day the Court having considered the petition of the defendants in the above styled cause wherein they pray for a modification of the orders of this Court, entered on August 28, 1956, and September 3, 1957, respectively, so as to permit a temporary suspension of the defendants' plan for the gradual racial integration of the public schools in Little Rock, Arkansas, and being well and fully advised, and having filed herein its memorandum opinion in connection with said petition, incorporating therein its findings of fact and conclusions of law,

IT IS BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED that the defendants be, and they hereby are, granted permission to suspend the operation of said plan of integration until mid-semester of the 1960-61 school year without being considered, either collectively or individually, in contempt of this Court.

The Court retains jurisdiction of this cause for such other and further proceedings as may hereafter become necessary or appropriate.

This the 20 day of June, 1958.

Order Denying Stay Pending Appeal

LEMLEY, J.

The motion of the plaintiff to stay the enforcement of the judgment in this action rendered by us on June 20, 1958, pending appeal therefrom, having been given new consideration by the court, is hereby denied.

As we understand the law, we have a discretion in this matter; and we feel that that discretion should be exercised in denying the motion, primarily for the reason that from a practical standpoint to grant this motion and stay the enforcement of our judgment would to a large extent nullify our order in the case, since it will in all probability take months to carry the case through the Court of Appeals and the United States Supreme Court; and in the meantime the situation at Central High School, which we have found to be intolerable from an educational standpoint, would continue from the beginning of the approaching session to the final ruling of the Supreme Court on the merits of the case; and for the reason stated in our opinion in said cause, we do not think that such is in the public interest, including the interest of both the white and Negro students in the Little Rock district.

The Honorable Archibald K. Gardner, Chief Judge of this circuit in assigning us to handle the school board's plea, gave us up to and including Sept. 1, 1958, within which to try and decide the case. In order that any aggrieved party might apply for appellate relief before the beginning of the next school session, our preliminary proceeding, the trial and the preparation and filing of our opinion and order were speeded up as fast as we felt such could be done and at the same time give proper consideration to the cause.

We do not feel that the plaintiffs are deprived of the opportunity of securing an appellate ruling on their motion for supersedeas by reason of the action we are now taking, since it will be more than two months before Central High School convenes this fall, and in the meantime the plaintiffs can apply at least to the Court of Appeals of this circuit for a stay of the enforcement of our judgment of this action.

This, the Twenty-third day of June, 1958.

U. S. Court of Appeals Opinion

MATTHES, Circuit Judge.

This appeal is another in a series of legal actions which followed the adoption and implementation of a plan for gradual integration of the public schools in Little Rock, Arkansas, as set up by the school board in that district, and approved by the United States District Court for the Eastern District of Arkansas, and by this Court. See Aaron v. Cooper (E. D. Ark. 1956) 143 F.Supp. 855, Aff'd 243 F.2d 361 (8 Cir. 1957); Thompson v. Cooper (8 Cir. 1958) 254 F.2d 808; Faubus v. United States (8 Cir. 1958) 254 F.2d 797.

In conformity with the plan, and under the direction of the superintendent of schools of the Little Rock School District (hereinafter called "district"), approximately sixty Negro students were meticulously screened prior to the opening of schools in September, 1957. Seventeen were accepted for entrance in the final two years in high school, but when eight of the students voluntarily withdrew, the nine remaining attempted to enter the school when it opened. After a series of skirmishes, resulting in the placing of troops around the central high school building, (see Faubus v. United States, *supra*), the nine Negro students were admitted and eight of them attended the full year. On February 20, 1958, the members of the school board (hereinafter called "board") and the superintendent, filed a petition in the United States District Court, Eastern District of Arkansas, Western division, asking that the plan of integration "be realistically reconsidered in the light of existing conditions," and that it be postponed until such time as the concept of "all deliberate speed" could be clearly defined. Thereafter, the Honorable Harry J. Lemley, United States district judge for the Eastern and Western districts of Arkansas, was designated by the chief judge of this circuit to hear and determine the issues presented by the petition. At the district court's direction, appellees filed an amended petition in which they alleged that in light of existing conditions, they were of the opinion that a suspension of operations under the plan until January, 1961, was reasonable and advisable.

[*Motion To Dismiss*]

Appellants attacked the petition by a motion to dismiss, contending that the petition was insufficient to state a cause for relief or a claim for relief which would be cognizant under Rule 60 (b) of the Federal Rules of Civil Procedure. They also filed a response to the petition. Following an extended trial of the issues presented by the pleadings, the district court filed an exhaustive opinion, . . . F.Supp. . . ., and entered its order granting permission to suspend the operation of the plan of integration until mid-semester of the 1960-61 school year.

From that order, plaintiffs (appellants) prosecuted an appeal to this court. Because of the vital importance of the time element in the litigation, and in line with the suggestion of the supreme court in its per curiam order of June 30, 1958, on petition for certiorari, we heard the appeal on its merits on August 4, 1958.

A review of the events leading up to the present appeal, as revealed by the record, is necessary to a proper understanding of the meritorious question for decision.

On May 20, 1954, following the decision of the supreme court in Brown v. Board of Education on May 17, 1954, 347 U.S. 483, the board adopted a statement concerning the Brown decision, recognizing its responsibility to comply with Federal Constitutional requirements, and on May 24, 1955—several days prior to the supplemental opinion of the supreme court in Brown v. Board of Education, 349 U.S. 294, the board approved a "plan of school integration", which provided for a gradual integration of all public schools, beginning with the high school level, in the fall of 1957. See Aaron v. Cooper, 143 F.Supp. 855 for the plan in its entirely, Aff'd (8 Cir.) 243 F.2d 361.

[*Most Workable Plan*]

It was the feeling of the board that the plan, as proposed, was the most desirable and workable under all of the circumstances, and that as the result of an active public relations program, the public generally approved of the plan. However, a systematic campaign developed which undermined whatever confidence the public might have had in the plan to integrate the public schools. In November, 1956, the people of the State of Arkansas adopted: (A) Amendment 44 to the State Constitution, which commanded the general assembly to oppose by every constitutional method the "unconstitutional desegregation decisions of the United States Supreme Court" (1 Ark. Stat. 1947, 1957 Supplement); (B) A resolution of interposition which, *inter alia*, called upon the people of the United States and the governments of all the separate states to join the people of Arkansas in securing an adoption of an amendment to the Constitution of the United States which would provide that the powers of the Federal Government should not be construed to extend to the regulation of the public schools of any state, or to prohibit any state from providing for the maintenance of racially separate but substantially equal public schools within such state; (C) A pupil assignment law dealing with the assignment of individual pupils to individual public schools. The 61st general assembly of Arkansas, which convened in January, 1957, enacted Sections 80-1519 to 80-1524, Ark. Stat. 1957, known as the Pupil Assignment Law; Section 80-1525, *ibid*, which relieves school children of compulsory attendance in racially mixed public schools; Sections 6-801 through 6-824, *ibid*, which established a State Sovereignty Commission; Section 80-539, *ibid*, which authorizes local school boards to expend district funds in employing counsel to assist in the solution of problems arising out of integration.

During the summer of 1957, anti-integration forces, pointing to the recent Arkansas enactments, petitioned for, and received from the Pulaski Chancery Court at Little Rock, an injunction directed against the board, restraining any action towards integrating Little Rock Central high school during the school term beginning September 3, 1957. On August 29, 1957, on application of the board, the United States District Court at Little Rock entered an order enjoining the use of the state court injunction in an attempt to block the integration plan. We affirmed this order. Thomason v. Cooper (8 Cir.) 254 F.2d 808.

[*Segregationists' Campaign*]

From the testimony of the superintendent, and voluminous exhibits, consisting mainly of newspaper articles and paid advertisements, it is demonstrated that pro-segregationists carried on a relentless and effective campaign during the summer of 1957. The Governor of Georgia, Marvin Griffin, and Roy V. Harris, publisher, of the same state, and Reverend J. A. Lovell, described as a "Texas radio minister," appeared in Little Rock and delivered speeches against integration to large audiences. The effect of these efforts may be gleaned from the superintendent's testimony:

(Mr. Blossom)—"(B)ut there was a tremendous amount of opposition following the appearance of the Governor of Georgia . . . that this plan which had been developed as I explained over a long period of time, seemed to be driven out of everybody's mind. . . . In the minds of people who talked to me the thing that became prevalent [was] 'we don't have to do this when the Governor of Georgia says nobody else has to do it.'" On July 9, 1957, what purports to be a full page paid statement appeared in the Arkansas Democrat, the first two paragraphs of which are typical, not only of the statement in its entirety, but of other articles appeared from time to time in the same publication:

" 'People of Arkansas v. Race-Mixing! Official Policy of the State of Arkansas

"The people of Arkansas assert that the power to operate public schools in the state on a racially separate but substantially equal basis was granted by the people of Arkansas to the government of the State of Arkansas; and that, by ratification of the Fourteenth Amendment, neither the State of Arkansas nor its people delegated to the federal government, expressly or by implication, the power to regulate or control the operation of the domestic institutions of Arkansas; *any and all decisions of the Federal Government to the contrary notwithstanding.*'

"Whose statement is the above?

"It is the statement of Gov. Orval E.

Faubus of Arkansas. It is the core of the Resolution of Interposition which he personally fathered. Governor Faubus hired the solicitors who circulated the petitions to place this Resolution on the ballot. Governor Faubus filed Resolution and petitions with the Secretary of State on July 5, 1956, and the Resolution was submitted to the people in last November's general election. THE PEOPLE OF ARKANSAS BY A TREMENDOUS, OVERWHELMING MAJORITY GAVE IT THEIR THUNDERING APPROVAL.

"Sponsored by the Governor of Arkansas, adopted by a tremendous majority of Arkansas voters, THE ABOVE STATEMENT IS THE WILL OF THE PEOPLE OF ARKANSAS."

[*Opposition Solidified*]

As September 3rd approached, the opposition to Negro children entering Central High School had stiffened and solidified. On the night of September 2d, Governor Faubus appeared on television in Little Rock and announced that in the interest of preserving peace, he had called out units of the national guard, and had directed that the white schools be placed "off limits" to Negro students, and that the Negro schools be placed "off limits" to white students. The subsequent events, which ultimately brought fourth United States troops, and the entry of the nine Negro children in Central High School, are found in our opinion in Faubus v. United States, *supra*.

The record firmly establishes that although the Negro children attended Central High School during the 1957-58 school term under the protection of federal troops, and later, federalized national guardsmen, the opposition to the plan of integration by many members of the public, and particularly parents of white students, failed to subside. Whether the white students who were the trouble makers, stood for segregation of the races in schools as the result of their environment over the years, or because of the intense campaign that was focused upon that issue by adults, does not appear, but the indisputable fact is that certain of the white students demonstrated their hostility to integration by overt acts of violence and misconduct, committed within the school building, as well as by destruction of school property through acts of vandalism. The events which occurred during the school year may be summarized as follows:

1) Although there were no unusual events in the classrooms, there were a number of incidents in the halls, corridors, cafeteria and rest rooms, consisting mainly of "slugging, pushing, tripping, catcalls, abusive language, destruction of lockers, and urinating on radiators."

2) Forty-three bomb threats necessitated searches of the school building, and particularly the lockers, some 2400 in number. These bomb threats were broadcast on the local radio and television stations, precipitating calls from parents and withdrawal of students for the day.

3) Numerous small fires occurred within the building, particularly in rest rooms where tissue paper and towels accumulated.

4) The destruction of school property throughout the school necessitated the expenditure of school funds, which might otherwise have been used for general maintenance purposes, to repair the damage.

5) Misconduct on the part of some students resulted in approximately 200 temporary suspensions for short periods of time, and two permanent expulsions.

6) The administrative staff in the school spent a greal deal of time making reports of incidents, alleged and real, arising out of opposition to the presence of nine Negro students.

7) Teachers and administrative staff were subjected to physical and mental strain and telephone threats.

8) Inflammatory anti-integration speeches were made at public meetings by speakers from other states, and the local newspapers carried many anti-integration articles.

9) Vicious circulars were distributed condemning the District Court, the Supreme Court of the United States, and the school officials who recognized the supremacy of the federal law.

10) Vulgar cards, critical of the school officials, were given by adults to school children for distribution within the school building.

11) In general there was bedlam and turmoil in and upon the school premises, outside of the classrooms.

[*Delay Can Not Stand*]

Careful and critical analysis of the relevant

facts and circumstances in light of applicable legal principles, leads us to the inescapable conclusion that the order of the district court suspending the plan of integration can not stand.

In Brown v. Board of Education, 349 U.S. 294, the Supreme Court, in dealing with the manner in which integration should be effected, recognized that full implementation of the constitutional principles involved may require solution of varied local school problems—and that the school authorities have the primary responsibility for "elucidating, assessing, and solving the problems." While the district courts, aided and guided by equitable principles, may properly take into account the public interest in the elimination of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in Brown v. Board of Education, May 17, 1954, 347 U.S. 483, it should be emphasized that the court, in the opinion dealing with the relief to be granted, stated (349 U.S. at Page 300): "But it should go without saying that the vitality of these constitutional principles *cannot be allowed to be yielded simply because of disagreement with them.*" (Emphasis supplied)

The precise question at issue herein, *i.e.*, whether a plan of integration, once in operation, may lawfully be suspended because of popular opposition thereto, as manifested in overt acts of violence, has not received judicial consideration. But there is sound and convincing authority that a school board, "acting promptly and *completely uninfluenced by private and public opinion* as to the desirability of desegregation in the community," must proceed with deliberate speed, consistent with proper administration, to abolish segregation, Jackson v. Rawdon (5 Cir. 1956) 235 F.2d 93, 96, certiorari denied 352 U.S. 925; School Board of the City of Charlottesville, Va., v. Allen (4 Cir. 1956) 240 F.2d 59, certiorari denied, 353 U.S. 910; and while ". . . a good faith acceptance by the school board of the underlying principle of equality of education for all children with no classification by race might well warrant the allowance by the trial court of time for such reasonable steps in the process of desegregation as appears to be helpful in avoiding unseemly confusion . . . (n)evertheless, whether there is such acceptance by the board or not, the duty of the Court is plain. *The vindication of rights guaranteed by the constitution can not be conditioned upon the absence of practical difficulties.*" (Emphasis supplied). Orleans Parish School Board v. Bush (5 Cir. 1957) 242 F.2d 156 at p. 166, certiorari denied 354 U.S. 921. "The fact that the schools might be closed if the order were enforced is no reason for not enforcing it," Allen v. County School Board of Prince Edward County, Va., (4 Cir. 1957) 249 F.2d 462, 465, certiorari denied 355 U.S. 953, because, as the court there stated, at page 465: "A person may not be denied enforcement of rights to which he is entitled under the constitution of the United States because of action taken or threatened in defiance of such rights."

[*Community Opposition*]

In his opinion —— F.Supp. ——, which incorporated findings of fact and conclusions of law, Judge Lemley, who has most carefully and conscientiously considered the problem presented, recognized that the occurrences which motivated the instant proceeding were the direct result of general community opposition to integration. He stated:

> "From the practically undisputed testimony of the board's witnesses we find that although the continued attendance of the Negro students at Central High School was achieved throughout the 1957-58 school year by the physical presence of federal troops, including federalized national guardsmen, *nevertheless on account of popular opposition to integration* the year was marked by repeated incident of more or less serious violence directed against the Negro students and their property, by numerous bomb threats directed at the school, by a number of nuisance fires started inside the school, by desecration of school property, and by the circulation of cards, leaflets and circulars designed to intensify opposition to integration. . . ." (Emphasis added.)
>
> "It is important to realize, as is shown by the evidence, that the racial incidents and vandalism which occurred in Central High School during the past year did not stem from mere lawlessness on the part of the white students in the school, or on the part of the people of Little Rock outside the school; nor did they stem from any malevolent desire on the part of the students or others concerned to bomb the school, or to burn it down, or to injure or persecute as individuals the nine Negro students in the

school. *Rather, the source of the trouble was the deep seated popular opposition in Little Rock to the principle of integration, which, as is known, runs counter to the pattern of southern life which has existed for over three hundred years.* The evidence also shows that to this opposition was added the conviction of many of the people of Little Rock, that the Brown decisions do not truly represent the law, and that by virtue of the 1956-57 enactments, heretofore outlined, integration in the public schools can be lawfully avoided." (Emphasis supplied.)

". . . in reaching this conclusion we are not unmindful of the admonition of the Supreme Court that the vitality of those principles 'cannot be allowed to yield simply because of disagreement with them'; here, however, as pointed out by the board in its final brief, the opposition to integration in Little Rock is more than a mere mental attitude; it has manifested itself in overt acts which have actually damaged educational standards and which will continue to do so if relief is not granted."

[*Conclusions Unacceptable*]

Appalling as the evidence is—the fires, destruction of private and public property, physical abuse, bomb threats, intimidation of school officials, open defiance of the police department of the City of Little Rock by mobs—and the naturally resulting additional expense to the district, disruption of normal educational procedures, and tension, even nervous collapse of the school personnel, we cannot accept the legal conclusions drawn by the district court from these circumstances. Over and over again, in the testimony, we find the conclusion that the foregoing turmoil, chaos and bedlam directly resulted from the presence of the nine Negro students in Central High School, and from this conclusion, it appears that the district court found a legal justification for removing temporarily the disturbing influence, *i.e.*, the Negro students. It is more accurate to state that the fires, destruction of property, bomb threats, and other acts of violence, were the direct result of popular opposition to the presence of the nine Negro students. To our mind, there is a great difference from a legal standpoint when the problem in Little Rock is stated in this manner. From the record it appears that none of the Negro students was responsible for the incidents on the school property, and the one Negro expulsion seems to have resulted after the Negro student was physically struck in the face, following which it was found that the student had "failed to adjust", in violation of an agreement with the school board not to become embroiled in incidents.

[*Board's Good Faith*]

This court recognizes that, following the first Brown decision, the members of the board, acting in good faith, and working with the superintendent of schools, moved promptly to promulgate a plan designed to gradually bring about complete integration in the Little Rock public schools, and they are to be commended for their efforts in that regard. We are also not unmindful of the difficulties which were faced by the board members and school administrators in attempting to give life to the plan of integration. As we have seen, they have been constantly harrassed; they have met with overt opposition from the public, and the legislature through passage of the 1957 enactments. The executive department of the state of Arkansas has openly opposed their efforts, as demonstrated by the statement by the governor of the official policy of the state of Arkansas against integration, followed by the use of national guardsmen to prevent entry of Negro students. The result was to place the board between "the upper and the nether millstone." See Thomason v. Cooper, 254 F.2d 808 at Page 810. While it may appear to the members of the board and the superintendent, that they have a thankless task, they may be recompensed by the knowledge that throughout, they, as public officers, have recognized their duty to support the constitution of the United States, and to respect the laws and courts of our federal government, and our democratic ideals, regardless of their personal convictions with respect to the wisdom of school integration.

It is not the province of this court in this proceeding to advise the board as to the means of implementing integration in the Little Rock schools. We are directly concerned only with the legality of the order under review. We do observe, however, "that at no time did the board seek injunctive relief against those who opposed by unlawful acts the lawful integration plan, which action apparently proved successful in the Clinton, Tennessee and Hoxie, Arkansas situations." See Kasper v. Brittain, 245 F.2d 92 (6 Cir. 1957), certiorari denied 355 U.S. 834, re-

hearing denied 355 U.S. 886; Hoxie School District v. Brewer (E.D. Ark.) 137 F.Supp. 364, Aff'd Brewer v. Hoxie School District (8 Cir. 1956) 238 F.2d 91. The evidence also affords some basis for belief that if more rigid and strict disciplinary methods had been adopted and pursued in dealing with those comparatively few students who were ring leaders in the trouble making, much of the turmoil and strife within Central High School would have been eliminated.

[*Impossible Situation*]

An impossible situation could well develop if the district court's order were affirmed. Every school district in which integration is publicly opposed by overt acts would have "justifiable excuse" to petition the courts for delay and suspension in integration programs. An affirmance of "temporary delay" in Little Rock would amount to an open invitation to elements in other districts to overtly act out public opposition through violent and unlawful means. The Supreme Court of the United States has specifically determined that segregation in the public schools is a deprivation of the Equal Protection of Laws guaranteed by the Fourteenth Amendment. The board, by public statement, has recognized its constitutional duty to provide nonsegregated educational opportunities for the children of Little Rock; The district court, in its memorandum opinion, *supra*, at page ....., stated: ". . . It is not denied that under the Brown decisions the Negro students in the Little Rock district have a constitutional right not to be excluded from any of the public schools on account of race;". Acting under a federal court order, the board did proceed with a fair and reasonable program for gradual integration, which program had previously been approved by this court. This issue plainly comes down to the question of whether overt public resistance, including mob protest, constitutes sufficient cause to nullify an order of the Federal court directing the board to proceed with its integration plan. *We say the time has not yet come in these United States when an order of a federal court must be whittled away, watered down, or shamefully withdrawn in the face of violent and unlawful acts of individual citizens in opposition thereto.*

Mindful as we are that the incidents which occurred within Central High School produced a situation which adversely affected normal educational processes, we nevertheless are compelled to hold that such incidents are insufficient to constitute a legal basis for suspension of the plan to integrate the public schools in Little Rock. To hold otherwise would result in ". . . accession to the demands of insurrectionists or rioters . . .", Strutwear Knitting Co. v. Olson, 13 F.Supp. 384 at 391, and Faubus v. U.S. 254 F.2d 797 at 807, and the withholding of rights guaranteed by the Constitution of the United States. Accordingly, the order of the district court is reversed, with directions to dismiss the appellees' petition.

Dissent

GARDNER, Chief Judge, dissenting.

I would affirm on the grounds stated by Judge Lemley in his opinion Aaron v. Cooper, E.D.Ark. —— F.Supp.——.

Because of the limitation of time within which this case must be decided it is not possible to prepare a dissenting opinion and, hence, I am preparing only a short memorandum.

It is conceded that the school authorities have acted in good faith both in formulating a plan for integrating and in attempting to implement that plan. Their efforts in this regard were met with unprecedented and unforeseen opposition and resistance as set out and enumerated in the majority opinion. This opposition included acts of violence to such an unprecedented extent that the armed forces of the United States were stationed in and about the school building. The events pertinent to the attempts of the school authorities during the school year to implement its plan for integrating are set forth in the majority opinion. The normal conduct of the school was continuously disrupted and the state of mind, both within and without the school, was to a greater or lesser extent in a state of hysteria. Under circumstances and conditions set out in Judge Lemley's opinion the school authorities made application for an extension of time so as to permit a cooling off or breathing spell so that both pupils, parents, teachers and the public might to some extent become reconciled to the inevitable necessity for public school integration. Having in mind that the school officials and the teaching staff acted in good faith and that the school officials presented their petition for an extension of time in good faith, it was the duty of the court "to consider whether the action of school authorities constitutes good faith imple-

mentation of the governing constitutional principles". Brown v. Board of Education, 349 U.S. 294. In this situation the action of Judge Lemley in extending the time as requested by the school officials was the exercise of his judicial discretion. The background is well set forth in Judge Lemley's opinion. For centuries there had been no intimate social relations between the white and colored races in the section referred to as the South. There had been no integration in the schools and that practice had the sanction of a decision of the Supreme Court of the United States as constitutionally legal. It had become a way of life in that section of the country and it is not strange that this long-established, cherished practice could not suddenly be changed without resistance. Such changes, if successful, are usually accomplished by evolution rather than revolution, and time, patience, and forbearance are important elements in effecting all radical changes.

The action of Judge Lemley was based on realities and on conditions, rather than theories. The exercise of his discretion should not, I think, be set aside as it seems to me it was not an abuse of discretion but rather a discretion wisely exercised under the conditions. We should not substitute our judgment for that of the trial court. Judge Lemley's decision is not without precedent in principle. It is, I think, warranted by the decision of the Supreme Court in Brown v. Board of Education, 349 U.S. 294. See also Allen v. County School Board of Prince Edward County, E.D.Va., ... F.Supp. .....; Davis v. County School Board of Prince Edward County, E.D. Va., 149 F.Supp. 431; Wisconsin v. Illinois, 278 U.S. 367, modified, 281 U.S. 179, 289 U.S. 395, 309 U.S. 569, 311 U.S. 107; Standard Oil Co. v. United States, 221 U.S. 1. It was the judgment of the school officials as indicated by their petition and, after hearing, the judgment of the trial court, that the extension of time requested should be granted. I do not think it can be said that the findings of the trial court and its conclusion based thereon are clearly erroneous. I would affirm.

Order Granting Stay Pending Appeal

August 21, 1958

Opinion of this Court was filed and judgment entered August 18, 1958. Appellants, on August 20, 1958, filed a Motion for issuance of mandate forthwith and Appellees have today filed Application for Stay of Mandate pending proceedings in the Supreme Court of the United States.

These motions have been considered by the Court and it is hereby Ordered that Appellants' Motion for issuance of mandate is denied, and on application of appellees it is Ordered that the issuance of the mandate be, and it is hereby, stayed for a period of thirty days from and after this date, and if within said period there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until final disposition of this case by the Supreme Court.

EDUCATION
Public Schools—Louisiana

ORLEANS PARISH SCHOOL BOARD v. Earl Benjamin BUSH et al.

United States District Court, Eastern District, Louisiana, New Orleans Division, July 1, 1958, Civil No. 3630.

SUMMARY: Negro school children in Orleans Parish, Louisiana, brought a class action in federal district court seeking injunctive and declaratory relief as to their right to admission to public schools in the parish without regard to race or color. A three-judge district court

which first heard the case determined that Louisiana constitutional and statutory provisions requiring or permitting racial segregation in public educational facilities were unconstitutional. 138 F.Supp. 336, 1 Race Rel. L. Rep. 305 (E.D. La. 1956). The single-judge district court which then heard the case held that the suit was not a suit against the state, that there was a justiciable controversy, and that the plaintiffs had effectively exhausted all valid administrative remedies available to them. The court issued a preliminary injunction requiring the desegregation of the parish schools "with all deliberate speed." 138 F.Supp. 337, 1 Race Rel. L. Rep. 306 (E.D. La. 1956). The United States Supreme Court declined a direct review of this decision 351 U.S. 948, 1 Race Rel. L. Rep. 643 (1956). On appeal, the Court of Appeals for the Fifth Circuit affirmed. The court held, in part, that the Louisiana constitutional and statutory provisions could not be held valid as a proper exercise of the state police powers since such powers could not be used as a means of depriving the plaintiffs of constitutional rights. 242 F.2d 156, 2 Race Rel. L. Rep. 308 (1957). The United States Supreme Court declined to review this action. 354 U.S. 921, 2 Race Rel. L. Rep. 778 (1957). The school board then filed a motion in the district court to vacate the preliminary injunction because no bond had been filed by the plaintiffs as required by the original decree. The plaintiffs then filed a bond which was approved by the district court and the court denied the board's motion. The board appealed to the Court of Appeals for the Fifth Circuit. The Court of Appeals affirmed the order denying the motion to vacate. The court held that the failure to file a bond immediately had not damaged the board, which had, in effect, waived the filing. 252 F.2d 253, 3 Race Rel. L. Rep. 171 (1958). The school board then moved to vacate the preliminary injunction relying on an act of the 1956 Louisiana Legislature (1 Race Rel. L. Rep. 927) which transferred the board's control of classification of public schools to a state agency. The court in denying the motion to dismiss, declared that, "Any legal artifice, however cleverly contrived, which would circumvent this ruling [*Brown v. Board of Education, supra*], and others predicated on it, is unconstitutional on its face."

WRIGHT, District Judge:

This litigation is long standing. On February 15, 1956 this Court, after declaring certain state laws compelling segregation in the public schools of the State of Louisiana unconstitutional,[1] restrained and enjoined this defendant, and persons acting in concert with it, from "requiring and permitting segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially nondiscriminatory basis with all deliberate speed as required by the decision of the Supreme Court in Brown v. Board of Education of Topeka, supra."

In order to avoid the effect of the ruling of this Court in this case requiring desegregation in the public schools of the City of New Orleans, the Legislature of the State of Louisiana passed Act 319 of 1956.[2] Relying on Section 4[3] of that Act, the defendant herein has moved to vacate this Court's injunction and dismiss the litigation on the ground that, by reason of this section, the defendant herein, Orleans Parish School Board, no longer controls the classification of public schools as between Negro and white children.

It would serve no useful purpose to labor this

1. Bush v. Orleans Parish School Board, 138 F.Supp. 337, aff'd 5 Cir., 242 F.2d 156, cert. den. 354 U.S. 921.
2. La. R.S. 17:341 et seq.
3. Section 4 of Act 319 of 1956 reads:
"The president of the senate shall appoint two members from that body, and the speaker of the house shall appoint two members from the house of representatives who shall serve as the Special School Classification Committee of the Louisiana Legislature, which committee shall have the power and authority to classify any new public schools erected or instituted, or to re-classify any existing public school, in any city covered by the other provisions of this Sub-part, so as to designate the same for the exclusive use of children of the white race or for the exclusive use of children of the Negro race. Any such classification or re-classification shall be subject to confirmation by the legislature of Louisiana at its next regular session, said confirmation to be accomplished by concurrent resolution of the two houses of the legislature. It is clearly understood that the legislature of the state of Louisiana reserves to itself the sole power to classify or to change the classification of such public schools from all white to any other classification, or from all Negro to any other classification, and the action of the Special School Classification Committee as recited hereinabove shall not become final until properly ratified by the legislature."

matter. The Supreme Court has ruled that compulsory segregation by law is discriminatory and violative of the equal protection clause of the Fourteenth Amendment. Brown v. Board of Education of Topeka, 349 U.S. 294. Any legal artifice, however cleverly contrived, which would circumvent this ruling, and others predicated on it, is unconstitutional on its face.[4] Such an artifice is the statute in suit.

Motion to dismiss denied.

4. See Lane v. Wilson, 307 U.S. 268.

EDUCATION
Public Schools—Tennessee

Robert W. KELLEY et al. v. BOARD OF EDUCATION OF THE CITY OF NASHVILLE, Tennessee, et al.

United States District Court, Middle District, Tennessee, July 17, 1958, Civ. No. 2094.

SUMMARY: White and Negro patrons of public schools in Nashville, Tennessee, filed an action in federal district court seeking to require the city Board of Education to admit children to public schools in the city without regard to race or color. A three-judge court determined that it did not have jurisdiction, the invalidity of Tennessee constitutional and statutory provisions requiring racially-separate schools being conceded by the defendants, and remanded the case to a single judge court. The court found good faith progress toward eliminating segregation in the schools and granted a continuance to the next term of court. 139 F.Supp. 578, 1 Race Rel. L. Rep. 519 (1956). Later a motion to intervene in the case by members of the Tennessee Federation for Constitutional Government was denied by the court. 1 Race Rel. L. Rep. 1042 (1956). On October 29, 1956, the Board of Education adopted a plan providing for the elimination of compulsory segregation in the first grade beginning with the 1957-58 school year, and setting a date for further consideration of additional integration. 1 Race Rel. L. Rep. 1120. The court approved the plan in part as being a prompt and reasonable start toward complete integration, but directed the Board to submit, before December 31, 1957, "a complete plan to abolish segregation in all of the remaining grades of the city school system, including a time schedule therefor." 2 Race Rel. L. Rep. 21 (1957). In August, 1957, the board moved to file a supplemental answer in order to ascertain its authority under, and the validity of, recent Tennessee legislation. The legislation (Chapter 11, Tennessee Public Acts, 1957, 2 Race Rel. L. Rep. 215) authorizes boards of education to provide separate schools for white and Negro children whose parents or guardians elect that they attend such schools. The court denied the motion, holding the act in question to be, on its face, antagonistic to the constitutional principles announced in the *School Segregation Cases* and therefore unconstitutional. 2 Race Rel. L. Rep. 970 (1957). [See also 2 Race Rel. L. Rep. 976 for orders of the court restraining certain named persons from interfering with the implementation of the order requiring integration.] The board filed with the court, on December 7, 1957, a plan which would authorize the assignment of pupils to one of three categories of schools on a racially segregated or non-segregated basis in accordance with the preference of the parent or guardian. 3 Race Rel. L. Rep. 16. After filing the plan, the board moved that the case be dismissed on the ground that, under the Tennessee Pupil Assignment Act (see 2 Race Rel. L. Rep. 215), an adequate administrative remedy exists which the plaintiffs should be required to exhaust before resorting to court for relief. After hearing, the court ruled against the motion to dismiss. The court stated that the remedy provided by the Pupil Assignment Act is not an adequate remedy because the administrative agency to which school patrons must apply for assignment is the city Board of Education which is "committed in advance to a continuation of compulsory segregation." The court further disapproved the

plan submitted by the board as being unconstitutional. The court also directed the board to file, by April 7, 1958, "a substantial plan and one which contemplates elimination of racial discrimination throughout the school system with all deliberate speed." 159 F.Supp. 272, 3 Race Rel. L. Rep. 180 (1958). The defendant school board filed a plan on April 7, 1958, calling for the desegregation of an additional grade each school year, beginning with grade two in September, 1958. After hearing, the court held the defendants "have carried the burden of proof to establish the validity of the school board plan" and therefore approved it. The court's opinion, judgment, findings of fact and conclusions of law are reproduced below:

Memorandum Opinion

June 19, 1958

MILLER, District Judge:

The question at issue is whether the Court should approve the School Board's plan filed April 7, 1958, to desegregate the public schools of Nashville. A hearing was held on April 14, 1958, at which witnesses were offered on behalf of the defendants to support the plan and by the plaintiffs in opposition to it. Following the hearing the case was thoroughly briefed by the attorneys for the respective parties.

The history of the litigation since the filing of the complaint was fully set forth in the Court's opinion filed February 18, 1958, which required further study by the School Board and the submission of another plan not later than April 7, 1958. The plan so filed is as follows:

"That the Plan heretofore submitted to the Court, and approved by the Court as modified, be supplemented as follows:

A. Compulsory segregation based upon race is abolished in Grade Two of the schools of the City of Nashville for the scholastic year beginning in September 1958, and thereafter for one additional grade beginning with each subsequent school year, i. e., for Grade Three in September 1959, Grade Four in September 1960, etc.

B. All provisions of the Plan with respect to zoning, transfers and the like shall continue in force and effect with respect to each additional grade as the Plan becomes applicable to such grade.

C. The Board of Education declares its policy to be to keep the United States District Court for the Middle District of Tennessee informed of the progress being made at such intervals as the Court may desire or direct and of such problems as may arise or be solved, which in the opinion of the Board of Education should be called to the attention of the Court.

A review of the evidence offered at the hearing discloses divergent theories as to the best plan to effect a transition from the long-standing segregated system of public education in Nashville to a desegregated system. The plan of the School Board to desegregate the schools one grade each year beginning with the lower grades is strongly supported by the testimony of Superintendent of Schools, W. H. Oliver, by the former Superintendent of Schools, W. A. Bass, by the Chairman of the Instruction Committee of the Board, Elmer Lee Pettit, and by the principal of Glenn School, Miss Mary Brent. There can be no doubt that these witnesses, based upon their years of experience in education and upon their intimate knowledge of conditions in Nashville, sincerely believe that a sudden or abrupt transition to a desegregated basis would engender administrative problems of such complexity and magnitude as to seriously undermine and impair the educational system of the city. They are convinced that the change-over from a segregated system of public education in this particular area of the south is one of such drastic character, such a reversal of custom, tradition, and settled practice, that disagreement with it is pervasive, far-reaching and deep seated. It is their opinion that proper school administration requires that the School Board in devising a plan should take into account the existence of this factor in order to minimize its effects upon the efficiency of the schools. They support the School Board's plan primarily because they feel that it offers the best opportunity to bring about full desegrega-

tion harmoniously and without serious disruption of the educational program of the city.

[*No Direct Experience*]

The witnesses testifying for the plaintiffs, although of undoubted educational background and experience, have had no direct or official connection with the public schools of Nashville other than the witness Coyness L. Ennix, the only colored member of the School Board. Moreover, these witnesses are in disagreement among themselves as to the best plan to be followed in effecting the change from a segregated system as required by the decisions of the Supreme Court. The witnesses, Herman H. Long and Mrs. Preston Valien, apparently favor a plan which would require immediate desegregation in all of the public schools of the city. Dr. Preston Valien, on the other hand, advocates a plan which would accomplish desegregation on the basis of administrative units, that is, first, the elementary schools would be desegregated, then the junior high schools, and finally the high schools. Coyness L. Ennix, according to his testimony, first favored the plan of total and immediate desegregation but his views underwent a change after the violent eruption which occurred upon the opening of the schools in the fall of 1957. He now supports the administrative unit plan advocated by Dr. Valien, or some gradual plan of a similar nature.

In summary, all four of the defendants' witnesses, all of whom have had years of experience in the administration of the schools of Nashville and are in intimate contact with the conditions in that city, support without reservation the gradual plan adopted and submitted by the School Board. On the other hand, of the four witnesses for the plaintiffs, only two of them support a plan of total and immediate desegregation, whereas the other two support some type of gradual desegregation. It, therefore, appears that the defendants have carried the burden of proof to establish the validity of the School Board plan and that it should receive the approval of the Court.

[*Operation of Schools*]

As the Court in this case has repeatedly pointed out, it is not the business of the Federal Courts to operate the public schools and they should intervene only when it is necessary for the enforcement of rights protected by the Federal Constitution. If the judgment of the School Board was clearly erroneous, or if it was not supported by the evidence, the Court would be justified in finding that the defendants had not carried the burden of proof resting upon them and that the School Board's plan should be disapproved. However, where, as in this case, the judgment of the School Board is supported by the clear preponderance of the evidence, it would be an unwarranted invasion of the lawful prerogatives of the legally constituted school authority if the Court should undertake to set its judgment aside and substitute some other plan. Admittedly the problem is not susceptible of an easy solution. The Supreme Court of the United States has made it clear that adjustment must be made in accordance with the exigencies of each case and that the concept of "all deliberate speed" is a flexible one. For this reason decisions applying the desegregation doctrine in other cities or areas where different conditions obtain are of little value. Local conditions call for the application of a local remedy.

[*No Denial of Rights*]

In approving the present plan no denial of the constitutional rights of the plaintiffs or others similarly situated is involved. Such rights are distinctly recognized and the plan contemplates their full enforcement and application in accordance with a time schedule which though protracted for the best interests of the school system as a whole is nevertheless definite and unambiguous. Full desegregation is not denied. It is merely postponed.

A form of judgment together wth appropriate findings of fact and conclusions of law will be submitted for the approval of the Court.

JUDGMENT

July 17, 1958

This cause came on to be heard on April 14, 1958 upon the entire record, upon oral testimony without the intervention of a jury, and upon briefs and argument of counsel pursuant to which the Court, on June 19, 1958, filed its Memorandum and has this day filed Findings of Fact and Conclusions of Law, all of which are herein incorporated by reference.

It is, therefore, ORDERED, ADJUDGED and DECREED as follows:

1. That the original plan of the Board of Education of the City of Nashville approved as amended by the judgment of this Court entered on February 20, 1957, of record in Volume 19, page 785-786, and as further amended by the amended plan filed April 7, 1958 and which was the subject matter of the hearing held thereon on April 14, 1958, be approved, and that the prayer of the plaintiffs for injunctive relief be and is denied.

2. That jurisdiction of the action is retained during the period of transition.

To the foregoing action of the Court the plaintiffs except.

FINDINGS OF FACT

July 17, 1958

1. Reference is here made to the previous opinions and findings of this Court, which appear in the record.

2. Pursuant to order heretofore entered, the Board of Education of the City of Nashville filed with this Court its plan for desegregating the remaining grades of the school system, together with a time schedule therefor, as follows:

"That the Plan heretofore submitted to the Court, and approved by the Court as modified, be supplemented as follows:

A. Compulsory segregation based upon race is abolished in Grade Two of the schools of the City of Nashville for the scholastic year beginning in September 1958, and thereafter for one additional grade beginning with each subsequent school year, i. e., for Grade Three in September 1959, Grade Four in September 1960, etc.

B. All provisions of the Plan with respect to zoning, transfers and the like shall continue in force and effect with respect to each additional grade as the Plan becomes applicable to such grade.

C. The Board of Education declares its policy to be to keep the United States District Court for the Middle District of Tennessee informed of the progress being made at such intervals as the Court may desire or direct and of such problems as may arise or be solved, which in the opinion of the Board of Education should be called to the attention of the Court."

3. At the hearing held on April 14, 1958, the plan of the Board of Education was supported by testimony offered by the present Superintendent of Schools, by the former and now retired Superintendent of Schools, by the Chairman of the Instruction Committee and Acting Chairman of the Board and by a principal of one of the elementary schools in Nashville in which desegregation of the First Grade was accomplished in September, 1957 pursuant to a previous order of this Court.

4. The four witnesses for defendants were unanimous in their sincere belief, based upon their years of experience in education and upon their intimate knowledge of the conditions in Nashville, that a sudden or abrupt transition to a desegregated basis would engender administrative problems of such complexity and magnitude as to seriously undermine and impair the educational system of the City.

5. The four witnesses for defendants were convinced that the change-over from a segregated system of public education in this particular area of the South is one of such drastic character, such a reversal of custom, tradition and settled practice, that disagreement with it is pervasive, far-reaching and deep seated; that proper school administration requires that the School Board in devising a plan should take into account the existence of this factor in order to minimize its effects upon the efficiency of the schools; and they support the School Board's plan primarily because they feel that it offers the best opportunity to bring about full desegregation harmonously and without serious disruption of the educational program of the City.

6. The plaintiffs offered witnesses in opposition to the School Board's plan who, although of undoubted educational background and experience, have had no direct or official connection with the public schools of Nashville other than one such witness, who is the only colored member of the School Board.

7. Plaintiffs' four witnesses are in disagreement among themselves as to the best plan to be followed in effecting the change from a segregated system as required by the decisions of the Supreme Court. Two of said witnesses apparently favor a plan which would require immediate desegregation in all of the public schools of the City. One other such witness advocates a plan which would accomplish de-

segregation on the basis of administrative units, that is, first the elementary schools would be desegregated, then the junior high schools, and finally the high schools. The colored school board member first favored the plan of total and immediate desegregation but his views underwent a change after the violent eruption which occurred upon the opening of schools in the Fall of 1957, and he now supports the administrative unit plan just referred to, or some gradual plan of a similar nature.

8. In summary, all four of the witnesses for the defendant School Board, all of whom have had years of experience in the administration of schools of Nashville and are in intimate contract with the conditions in that City, support without reservation the gradual plan adopted and submitted by the School Board. On the other hand, of the four witnesses for the plaintiffs, only two of them support a plan of total and immediate desegregation, whereas, the other two support some type of gradual desegregation. It, therefore, appears that defendant School Board has carried the burden of proof to establish the validity of the School Board plan, and the plan is supported by the clear preponderance of the evidence.

CONCLUSIONS OF LAW

July 17, 1958

1. This cause has heretofore been retained in Court pursuant to the previous opinions and orders of this Court, and Conclusions of Law, to all of which reference is here made, and is now appropriately before this Court for final judgment.

2. It is not the business of the Federal Courts to operate the public schools and they should intervene only when it is necessary for the enforcement of rights protected by the Federal Constitution.

3. If the judgment of the School Board was clearly erroneous, or if it was not supported by the evidence, the Court would be justified in finding that the defendants had not carried the burden of the proof resting upon them and that the School Board's plan should be disapproved. However, where, as in this case, the judgment of the School Board is supported by the clear preponderance of the evidence, it would be an unwarranted invasion of the lawful prerogatives of the legally constituted school authority if the Court should undertake to set its judgment aside and substitute some other plan.

4. Admittedly the problem is not susceptible of an easy solution. The Supreme Court of the United States has made it clear that adjustment must be made in accordance with the exigencies of each case and that the concept of "all deliberate speed" is a flexible one. For this reason, decisions applying the desegregation doctrine in other cities or areas where different conditions obtain are of little value. Local conditions call for the application of a local remedy.

5. In approving the present plan, no denial of the constitutional rights of the plaintiffs or others similarly situated is involved. Such rights are distinctly recognized and the plan contemplates their full enforcement and application in accordance with a time schedule which though protracted for the best interests of the school system as a whole is nevertheless definite and unambiguous. Full desegregation is not denied. It is merely postponed

6. The original plan approved as amended by the order of this Court entered February 20, 1957, and of record in Volume 19, page 783, and as further amended by said amended plan hereinbefore quoted and which was the subject matter of the hearing held on April 14, 1958 constitutes a compliance with the applicable constitutional provisions as interpreted by the Supreme Court of the United States.

7. Said original plan as previously approved by this Court, and as herein amended, should be approved by this Court, and the prayer of the plaintiff for injunctive relief should be denied.

EDUCATION
Public Schools—Texas

DALLAS INDEPENDENT SCHOOL DISTRICT et al. v. EDGAR, et al.

United States Court of Appeals, Fifth Circuit, May 23, 1958, 255 F.2d 421.

SUMMARY: The Dallas School District brought suit against Texas State Commissioner of Education and other state officials in a federal district court in Texas seeking a declaratory judgment determining its rights under recent Texas legislation providing a local option election to determine whether to operate desegregated schools and in the event such desegregated schools were operated without the local option election, to withhold state funds. 2 Race Rel. L. Rep. 695 (1957). The school district contended that these state laws conflicted with the court's order to desegregate the public schools, and, in effect, asked for instructions. *Rippy v. Borders*, 3 Race Rel. L. Rep. 17 (5th Cir. 1957). The district court dismissed, and the Court of Appeals for the Fifth Circuit affirmed, on the ground that there was neither a justiciable controversy nor a federal statute giving the district court jurisdiction over this action. The school board subsequently issued a statement in which it declared it would continue segregation in the 1958-59 school term. 3 Race Rel. L. Rep. 788.

Before TUTTLE, BROWN and WISDOM, Circuit Judges.

TUTTLE, Circuit Judge.

This is an appeal from an order of the District Court dismissing a suit by the Dallas School District against the Texas State Commissioner of Education and other state officials. It sought to have the district court enter a declaratory judgment determining its right under two state laws dealing with the appellant's duty to carry out the mandate previously entered by the district court that it desegregate the schools under its jurisdiction with all deliberate speed. Borders v. Rippy, 5 Cir., 247 F.2d 268. These two statutes, which were already in force when the case of Borders, et al v. Rippy was last here for decision may be found in Vernon's Annotated Civil Statutes, 2900-a and 2901-a.[1] They seek, in short to circumscribe the power of any Texas school district to desegregate its public schools, which we held in the Borders case must, on the record, be done in the Dallas Independent School District.

In effect, the petition of appellant in this litigation says to the District Court: "You have ordered us to desegregate, although you have not set a date; now our creator, the State of Texas, has told us (1) if we do so without an election it will withhold our share of state funds and subject our officers to penal sanctions, and

1. The titles to these two Acts give a good idea of their content:

"An Act to provide local option elections to determine continuance or abolition of a dual school system in each public school district in the State of Texas; requiring continuance of such dual school system until abolishment thereof be authorized by prior vote of the qualified electors in a school district; providing that a dual system may be maintained by arrangements for transfer and the educating of children in other public school districts; permitting school districts which maintained integrated schools for the 1956-1957 school year to continue to do so unless such system is abolished in accordance with this Act; placing school districts under certain disqualifications for a violation of this Act; making violation an offense and prescribing the penalty therefor; and declaring an emergency." (Vernon's Annotated Civil States 2900-a)

"An Act to declare the public policy of the State of Texas with respect to public education; to provide for further study and analysis as a basis for general reconsideration of the efficiency of the system in promoting the progress of pupils in accordance with their aptitudes and in furtherance of social order and good will; pending such reconsideration to authorize district and county Board of School Trustees to provide for the continuation or establishment of units, facilities and curricula and the placement of pupils therein so as to assure the best practical educational curriculum and environment for the individual pupils consistent with the educational progress of others and the paramount function of the State's police power to assure social order, good will and the public welfare; and to prohibit such Boards from making or administering any order or reallocation of pupils without a finding by the Board or authority designated by it that such transfer or placement is as to each individual pupil consistent with the policies prescribed by this Act; authorizing transfer of pupils and funds from adjoining districts; authorizing assignment and reassignment of teachers; to establish the right of parents or guardians to withdraw children from public schools under certain conditions; to provide for appeals from the decisions of such Board in certain cases; providing that nothing in this Act shall affect any action heretofore taken by any school district in this State covering the subject matter of this Act; and declaring an emergency." (Vernon's Annotated Civil Statutes 2901-a)

(2) we may not reassign or transfer individual students without certifying that such reassignment or transfer is in accord with certain prescribed standards; now, you tell us whether to comply with your order in view of the action of the State of Texas, and if we do, tell us how we will be affected by the Texas laws."

[*No U. S. Statute Cited*]

Appellant points to no federal statute or provision of the federal constitution pursuant to which this proceeding is filed. It alleges generally that it is a civil action that arises under the constitution and laws of the United States, but fails to point to the statute or clause of the constitution on which it relies except to say, further, that it is under 28 U.S.C.A. §1343(3),[2] the civil rights jurisdiction statute, and 28 U.S.C.A. 1981 and 1983, the civil rights substantive statutes.

Appellant cites no authority for the proposition that a governmental unit, like a state-created school district is a "person" which can complain of state action denying it equal protection of the laws. Moreover, the complaint makes no affirmative allegation as to its legal contention vis-a-vis the appellees. It does not attack the constitutionality of the state statutes under the federal constitution; it does not even assert an adverse claim as against the appellees to the effect that they cannot legally enforce the state statutes. At most, it says: Here is the court's mandate; here are the statutes; we don't know how they will affect us; you enter a judgment "declarative of the rights, duties and obligations of the plaintiff to a United States Court of competent jurisdiction carrying out the final mandate of the United States Court and its position in relation to the two recently adopted legislative enactments."

[*No Place to Complain*]

The appellants' brief asserts that it, being a creature of the state and "owing its existence to legislative enactment, could not complain to a court of an unconstitutional act. If the legislature can create, it can later decimate," citing City of Trenton v. State of New Jersey, 262 U.S. 182. This is self evident, and so too is it equally plain under Mumme v. Marrs, 120 Tex. 383, 40 S.W.2d 31, that the appellant cannot assert a claim against the state, since "all school districts are subject to the plenary power of the Legislature." (This quotation comes from appellant's brief). This being so, there is obviously no justiciable controversy stated here. This would, of course, require the dismissal of the complaint for failure to assert a claim on which relief could be granted. But it also, and more importantly, because it touches on the district court's jurisdiction, demonstrates the inapplicability of the civil rights statutes to a claim of this kind. Thus, there is no statute giving the district court jurisdiction of such an action.

The dismissal was required, both for want of federal jurisdiction and for failure to state a cause of action for declaratory relief.

The judgment is AFFIRMED.

2. "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"
28 U.S.C.A. §1343(3).

EDUCATION
Colleges and Universities—Florida

The State of FLORIDA ex rel. Virgil D. HAWKINS v. BOARD OF CONTROL, a body corporate, et al.

United States District Court, Northern District, Tallahassee Division, Florida, June 18, 1958, Civ. No. 643.

SUMMARY: In an action commenced in 1949, a Negro sought admission to the school of law of the University of Florida. The Florida Supreme Court, in 1952, dismissed the action. That decision was reversed and remanded by the United States Supreme Court after the

initial decision in the *School Segregation Cases*. 347 U.S. 971, 1 Race Rel. L. Rep. 13 (1954). On remand, the Supreme Court of Florida, in effect, continued the case pending findings on questions of capacity, plant and other "conditions that now prevail" at the University of Florida School of Law. 83 So.2d 20, 1 Race Rel. L. Rep. 89 (1955). The United States Supreme Court refused to review this action, but recalled and vacated its prior order, and entered a new order stating that the factors justifying delay in applying the initial decision in the *School Segregation Cases*, recognized in the second "implementation" decision, were not applicable to graduate professional schools. 350 U.S. 413, 1 Race Rel. L. Rep. 297 (1956). The applicant then moved in the Florida Supreme Court for a peremptory writ of mandamus to require his immediate admission. That court, two justices concurring specially and two dissenting, held that it would refuse to grant the writ at the present time in the exercise of its judicial discretion. The court found that the admission at that time would lead to "violence in university communities and a critical disruption of the university system." One justice concurred specially in the court's decision on grounds that the United States Supreme Court did not have before it the testimony regarding possible violence following the admission of a Negro to the university and should have an opportunity to consider that testimony. Two justices dissented on the grounds that the mandate of the Supreme Court should be obeyed. 93 So.2d 354, 2 Race Rel. L. Rep. 358 (1957). The United States Supreme Court denied certiorari "without prejudice to the petitioner seeking relief in an appropriate United States District Court." 355 U. S. 839, 2 Race Rel. L. Rep. 1093 (1957). Plaintiff then brought suit in federal district court, combining his request for an order requiring defendants to admit him to the University of Florida Law School with a class action seeking to enjoin the defendants from refusing to admit qualified Negro applicants solely on the basis of race, to any college or university under defendants' control. The court denied an application for a temporary injunction ordering plaintiff's immediate admission. This denial was appealed to the Court of Appeals for the Fifth Circuit and reversed. 253 F.2d 752, 3 Race Rel. L. Rep. 462. On remand, plaintiff rested his case after presenting testimony primarily related to the class action. Defendants moved to dismiss the cause of action on the ground that plaintiff had failed to prove his eligibility. Plaintiff's counsel then announced that plaintiff abandoned his prayer for an order directing defendants to admit him to the law school and sought only an order enjoining defendants from restricting admission to white students. The district court found that plaintiff had failed to prove his eligibility. The court held, however, that the class action was properly brought and that plaintiff was entitled to an injunction, but restricted the injunction to an order restraining defendants "from enforcing any policy, custom or usage of limiting admission to the *graduate* schools and *graduate* professional schools of the University of Florida to white persons only."

DEVANE, District Judge

This case has quite a long history. Plaintiff is a negro citizen and resident of the State of Florida. The case began in April 1949 when plaintiff applied for admission to the College of Law of the University of Florida. His application was denied by the Board of Control, the governing body of the State University system, solely because of certain provisions of the Constitution and Statutes of Florida prohibiting the admission of any but white students to the University, including the Law College. Hawkins thereupon instituted a mandamus action in the Supreme Court of Florida against the members of the Board of Control.

For anyone interested, the subsequent history of the case may be found in the following decisions of the Supreme Court of Florida and of the United States: State ex rel Hawkins v. Board of Control of Florida, et al., 47 So.2d 608; Same, 53 So.2d 116, Certiorari denied, 342 U.S. 877; Same, 60 So.2d 162, Certiorari granted, 347 U.S. 971; Same, 83 So.2d 20; Same 93 So.2d 534, Certiorari denied by the Supreme Court of the United States without prejudice to petitioner seeking relief in an appropriate United States District Court, 355 U.S. 839.

[*Sought Only Right To Enter*]

During the numerous times this case was heard by the Supreme Court of Florida and by the Supreme Court of the United States, plain-

tiff sought only the right to enter the University of Florida Law School as a law student. Following the decision of the Supreme Court of the United States in Brown v. Board of Education of Topeka, 349 U.S. 294, the Supreme Court of the United States and the various Circuit Courts have expanded greatly the rights of individuals to bring class actions affecting civil rights of negroes, so when the Supreme Court of the United States denied certiorari the last time plaintiff's state case appeared before it in October, 1957, (355 U.S. 839) but authorized plaintiff to come into this court for relief, plaintiff greatly expanded the relief requested by not only seeking the right for himself to enter the University of Florida Law School, but he also brought the suit as a class action pursuant to Rule 23(a) of the Federal Rules of Civil Procedure not only on behalf of himself, but also on behalf of other persons similarly situated, that is to say, negro citizens of the United States and of the State of Florida who are qualified to attend the various schools and colleges of the University of Florida which are maintained and operated by the defendants, but whose applications for admission had not been ruled upon favorably and the applicants admitted. The right of plaintiff to bring such an action has already been fully established in decisions of the Court of Appeals, Fifth Circuit, in the following cases and the cases there cited: Orleans Parish School Board v. Earl Benjamin Bush, et al. 242 F.2d 156, and Theodore Gibson as next friend of Theodore Gibson, Jr., et al. v. Board of Public Instruction of Dade County, Florida, et al., 246 F.2d 913. See also Rule 23(a), Federal Rules of Civil Procedure.

[*Temporary Injunction Asked*]

Promptly upon filing this action in this Court plaintiff made application to the Court for a temporary mandatory injunction directing the Board of Control to admit plaintiff to the University of Florida Law School at the beginning of the second semester in February, 1958. The Court denied this application of plaintiff and the case was appealed to the Court of Appeals, Fifth Circuit, where the order of denial was reversed and the case remanded to this court for further proceedings in accordance with the decision of the Court of Appeals in the case. See Hawkins v. Board of Control, et al., 253 F.2d 752.

In the complaint filed by plaintiff in this court plaintiff, as pointed out above, sought an order from this court directing the Board of Control to admit him as a law student at the University of Florida Law School. The greater part of his complaint is devoted to allegations stating his claimed rights in that respect, but as also pointed out above, he expanded the litigation in this court to make it a *class action* not only in behalf of himself, but of other persons similarly situated who had made applications for admission to various schools of the University of Florida.

When the case came on for trial before this court plaintiff offered testimony relating principally to the class action feature of the case and proved by testimony of the Executive Secretary of the Board of Control and the Registrar of the University of Florida the number of applications that had been received by the University over the past several years from negro students seeking admission to the University and that no negro had ever been admitted as a student at the University.

[*Motion to Dismiss*]

With this testimony in the record, plaintiff rested whereupon defendants filed motions to dismiss the cause of action on the ground that plaintiff had failed completely to show his eligibility for admission as a student to the Law School of the University. After extended argument on the motions filed by defendants, counsel for plaintiff read into the record a stipulation on behalf of plaintiff abandoning plaintiff's prayer for an order of this court directing the Board of Control and the Registrar of the University of Florida to permit him to enter said University as a law student and announced that plaintiff sought in this case only an order of this Court enjoining defendants from enforcing any policy, custom or usage of limiting admission to the University of Florida to white persons only.

Upon the issue in the case being so limited, the motions to dismiss were denied, whereupon counsel for defendants submitted testimony briefly upon the policy of the Board of Control with reference to the admission of negro students to the University, the reasons why none had been admitted since the decision of the Supreme Court of the United States in Brown v. Board of Education of Topeka, supra, and the attitude the Board would take with reference to such applications as soon as it felt free from litigation

continuously pending in courts affecting the rights and duties of the respective parties involved. Defendants also introduced certain exhibits touching upon the same matter and rested. Plaintiff offered no rebuttal testimony.

[*Class Action Status*]

The Court has carefully considered all the testimony submitted by the respective parties and finds and holds that upon the authority of the decisions of the Court of Appeals, Fifth Circuit, and Rule 23(a) cited above, this court has no alternative but to hold plaintiff is entitled to maintain this class action against defendants. When it comes to the relief that should be granted, the Court finds and holds upon the evidence submitted with reference to plaintiff's right to enter the University of Florida Law School that plaintiff failed completely to establish any such right under the law applicable to cases of this character and he will be denied the right to enter the law school.

When it comes to the relief that should be granted upon the class action feature of the case, the Court finds and holds that the evidence submitted by defendants clearly shows that the injunctive relief granted by this Court should be and it will be limited to enjoining the defendants from enforcing any policy, custom or usage of limiting admission to the *graduate* schools and *graduate* professional schools *of the* University of Florida to white persons only. There is abundant precedent elsewhere for so restricting the order of this Court.

[*Defendants' Authority*]

The Court recognizes that defendants have full and complete statutory authority to regulate admissions to the University of Florida and to act in emergencies to avoid public mischief and to take such normal, reasonable and necessary steps as will provide for the orderly and peaceable administration of said University, and nothing in this Memorandum Decision or in the order of this Court entered pursuant thereto will be construed as in any way limiting the authority of the Board of Control of Florida and the officers of the University of Florida vested with authority to supervise and control the activities of students from taking all necessary steps as will provide for the orderly and peaceable administration of the said University.

An appropriate order will be entered herein in conformity wth this Memorandum Decision.

EDUCATION
Teachers—Missouri

Naomi BROOKS et al. v. the SCHOOL DISTRICT OF THE CITY OF MOBERLY, Missouri, a corporation; Carl Henderson, Superintendent.

United States District Court, Eastern District, Missouri, Northern Division, June 27, 1958, Civ. No. 551.

SUMMARY: Eight Negro public school teachers in Moberly, Missouri, brought an action in a federal district court, seeking a declaratory judgment, injunction and damages against the local school board and superintendent, alleging a policy of discrimination in re-hiring teachers after the public schools were integrated in 1955. The board admitted plaintiffs' constitutional rights, but denied discrimination. The court gave judgment for the school officials, finding that while there was no indication of discrimination in hiring or re-hiring teachers, there was evidence that the teachers hired were better qualified than the plaintiff teachers.

MEMORANDUM OPINION

Plaintiffs, who were negro school teachers employed by the School District of the City of Moberly, Missouri, for the school year 1954-55, were not re-employed for the school year 1955-56. The plaintiffs allege that they were not rehired because of a practice, policy, rule or regulation adopted by the defendants, whereby only persons of the white race would be hired as teachers, and that under said practice, policy,

rule or regulation the District refuses to hire or rehire persons of the negro race as teachers in said District.

The plaintiffs seek a judgment or decree declaring that such practice, policy, custom and usage of the defendants is in violation of the Constitution and laws of the United States; that an injunction be issued forever restraining and enjoining the defendants from denying to qualified negro teachers employment in the school because of their race or color and from making any distinction whatsoever because of their race or color, and for damages.

Jurisdiction of this court is properly invoked since the Fourteenth Amendment to the Constitution is involved.

[*No Constitutional Dispute*]

There is no dispute between the parties as to the applicability of the Fourteenth Amendment to the Constitution. The plaintiffs in Paragraph 10 of their petition plead as follows:

> "The plaintiffs further state that under color of their authority, defendants and each of them in operating, managing and controlling the Public Schools under their control, have adopted a strict policy of not hiring duly qualified applicants of the negro race to teach in said Public Schools. This practice, policy, custom and usage of refusing to employ qualified Public School Teachers of the negro race in said district as school teachers, is arbitrary, illegal, unlawful and violative of the rights of the plaintiffs and has deprived them of employment in their chosen occupations."

Defendants in their joint answer with respect to Paragraph 10 of plaintiffs' complaint, answered as follows:

> "Defendants deny each and every allegation contained in Paragraph 10 of plaintiffs' complaint, except that defendants admit that if the facts therein stated were true, and a practice, policy, custom or usage, as charged in said paragraph, existed, or had existed, which defendants deny, that same would have been arbitrary, illegal, unlawful and violative of the rights of plaintiffs."

In view of the pleadings, it is not necessary for the court to deal with the rights of the parties under the Fourteenth Amendment. The problem for the court is to determine whether the action of the School District in not rehiring the plaintiffs, or any of them, for the school year 1955-56, was arbitrary, illegal, unlawful and violative of the rights of the plaintiffs, or any of them.

[*Long Segregated*]

There is little dispute between the parties as to the events which led to this litigation. The Moberly School System had been conducted as a segregated system until the decision of the Supreme Court declaring segregation invalid. Promptly after the Supreme Court decision, the School Board, in June, 1954, appointed a committee to study and report back to the Board the best method of integrating the schools. The Board operated elementary schools, high schools and a junior college, and enjoyed a triple A rating at the time. The committee appointed by the Board spent much time in giving careful consideration to the problem of integration and during its work on the problem held mass meetings with both the white and negro citizens. The committee reported to the Board in December of 1954, its report being a fifteen-page document, with two additional pages attached as exhibits to its recommendation. The committee suggested four plans, which, in brief, were as follows:

> (1) Close Lincoln School (the negro elementary and high schools) and send the pupils to the school district in which they lived. District boundaries would remain as at present.
>
> (2) Retain Lincoln School as an elementary unit for all pupils in a new district created from portions of Central, South Park and West Park. All elementary pupils would attend school in the district in which they lived.
>
> (3) Close Lincoln School and redistrict all Moberly, changing boundary lines where necessary to more nearly equalize enrollments.
>
> (4) Retain Lincoln School for negro pupils who might choose to attend there.

When the committee submitted the suggested four plans, it recommended Plan No. 2, which would retain Lincoln School as an elementary unit for all pupils in a new district created from portions of the entire district, and the two pages attached to the report set out in detail and in-

cluded a map of the proposed redistricting of the school into elementary districts. The Board upon receipt of the proposal and after due consideration of it, directed the committee to submit to the citizens its report and to seek their reaction to the various proposals and to advise them of its recommendation that Plan No. 2 be adopted.

There was employed during the 1954-55 school year by the district 109 teachers, 98 of whom were employed in the white schools and 11 in the negro school (Lincoln). The plan recommended by the committee would have required at least 109 teachers and possibly one or two more. When the report of the committee and its recommendation were submitted to the citizens, its recommended plan was vigorously opposed by both white and negro citizens, and as a result the integration committee filed a supplemental report, which, among other things, recommended to the Board that Lincoln School be closed and that the boundaries of existing districts be changed to equalize the enrollment of both negro and white pupils in the various elementary schools. The committee found that by making this change all of the pupils, both negro and white, could be absorbed into the remaining elementary schools without overcrowding and without increasing the pupil-teacher ratio beyond acceptable limits.

[*Queried by Teachers*]

The committee in holding the mass meetings had been queried by some of the negro teachers as to the effect on employment and they had been advised that the committee was not dealing with the question of teachers, but only with the integration of negro and white pupils and that the matter of employment of teachers was one for the Board, and the committee had not been vested with any power with respect to such nor asked to make any recommendation or report regarding same.

The supplemental integration report did, however, note that fewer teachers would be needed in the system if the plan which it recommended therein was adopted. The plan was adopted and met with approval by both the negro and white citizens, and the parties to this suit stipulated that the Board fairly and honestly and expeditiously went about and conducted the integration of the colored and white pupils in the Moberly school system prior to the filing of the suit. It was further stipulated in the case that no member of the School Board nor any person connected with the district attempted to influence the colored citizens of the district to accept a voluntary one-race colored school to be conducted in the former colored school building known as the Lincoln School Building.

[*Rule of Employment*]

The Board had in force at the time of the integration a rule with respect to the basis upon which the Superintendent of Schools should recommend the employment of teachers to the Board, under which the Board should employ teachers, which rule is at follows:

> "All applications for employment in Moberly Public Schools must be in writing and submitted to the Superintendent's office. All persons to be employed shall be recommended by the Superintendent and appointed by the Board of Education. Recommendations for appointment shall be made on the basis of merit, determined by Superintendent, from the applicant's qualifications, training, experience, personality and ability to fullfill the requirements of the position. All employees must be physically fit to serve efficiently. Teachers are to file a health certificate with the Superintendent before assuming their duties."

It was stipulated by the parties that this was a proper rule for the employment of teachers and was fair and just.

The supplemental integration report suggested that this rule be used in determining which teachers should be retained. It was stipulated by the parties in this case that it was the duty of the Board to employ in said districts the teachers who in its judgment best complied with the rules relating to the employment of teachers, and it was the further duty of the Superintendent to make his recommendation to the Board on the basis of the rules.

Under the law of Missouri, teachers who are not to be retained in a school system must be so notified of said fact by April 15th preceding the teaching year. Prior to April 15th the Superintendent of Schools in accordance with the rule set out above wrote each board member, two of whom were new, having been elected in the early part of that month, comparing as to training and experience the various teachers em-

ployed by the District, and on April 13th the Board met with the Superintendent and at that meeting the teachers in the system, both negro and white, were discussed with a view of determining which teacher should not be re-employed. The school where the negroes had been teaching and the positions they held had been abolished by the integration plan adopted, and 11 less teachers were needed under the plan than had been employed that year.

[*Full, Fair Consideration*]

The testimony indicates that at this meeting the training, experience, personality and ability to fulfill the requirements of the position, including various intangibles, were discussed, and the testimony indicates that the Board's decision was based on its rule with respect to the employment of teachers. There is no testimony that there was any effort to get rid of the negro teachers, either as individuals or as a group, because of race or color. The Board determined after a full and fair consideration of the matter that the white teachers in the system were better qualified than the negro teachers and none of the negro teachers were re-employed.

At the Board meeting the contracts of three white teachers were not renewed, but it was the established custom of the Board that when a teacher's contract was not renewed the position was treated as a vacancy, and that when a vacancy occurred it was the practice of the Superintendent to obtain as many applications as possible for the vacancy and to recommend the filling of the vacancy with the best qualified applicant. This procedure was followed as to the three vacancies. The negroes certified to teach in these three positions were considered as applicants for the position, some seven of them being so qualified, but three white teachers were hired to fill the vacancies, each of the three being considered better qualified to fulfill the requirements of the position than any of the negro applicants.

[*Record Cited*]

The plaintiffs put much stress upon the fact that they have been satisfactory teachers under a segregated system, that they were qualified to and did teach in a triple A system, and that the only reason they were not hired was because of their race and color. The testimony indicated that the supply of negro teachers was limited, that the plaintiffs did compare very favorably with other available negro teachers, but the ratings they had been given in the past years were based upon comparison with other negro teachers and not the teachers of the entire district, and when the system became an integrated one they were compared not with negro teachers alone, but with all the teachers available, and in the opinion of the Superintendent of Schools, who was best qualified to judge, there were other teachers available who were better qualified.

While it is true that in some respects some of the teaching positions were equivalent, or virtually so, although the Lincoln teachers often taught more than one grade, which was not true in the integrated system, it does not necessarily follow that because the positions were equivalent that the particular persons filling them were necessarily equal in all respects in professional attainment and efficiency. The individual qualifications, capabilities and abilities of each teacher must be considered, and human capabilities cannot be reduced to a mathematical formula. Intangible factors, such as personality, character, disposition, industry, adaptability, vitally affect the work of any teacher. The Superintendent's recommendation as to the various teachers was based upon information he obtained, his own observations, and observations of the principal and other teachers in responsible positions in the district. There was not the slightest inference in the testimony of these men that the race or color of any teacher entered into his recommendations. The court cannot substitute its judgment for that of the School Board or the Superintendent on the wisdom or expediency of a determination within the Board's jurisdiction, but must rather determine if there exists sufficient factual basis that the Superintendent and Board's actions were arbitrary and discriminatory with respect to the negro teachers.

[*Status of Teaching*]

It has long been recognized by the courts, as was said by Judge Thomas in Morris v. Williams, 149 F.2d 703, l.c. 708:

> "Teaching is an art; and while skill in its practice can not be acquired without knowledge and experience, excellence does not depend upon these two factors alone. The

> processes of education involve leadership, and the success of the teacher depends not alone upon college degrees and length of service but also upon aptitude and the ability to excite interest and to arouse enthusiasm."

The Superintendent in his testimony dealt specifically with each of the plaintiffs, comparing them with the teachers who were hired, and gave in detail his analysis on each. For the court to reiterate this testimony here would serve little purpose. He stated that only one of the 11 negro teachers compared favorably with the teachers employed, but that teacher is not one of the plaintiffs in this case. She was a very outstanding teacher and had she been available he stated he would have recommended to the Board that she be hired, but she had emphatically stated to him the year before that the 1954-55 season was definitely the last year she was going to teach, and in fact he had had trouble prevailing upon her to teach that year.

[*Since Re-employed*]

Nothing would be accomplished by the court in discussing the deficiencies related as to the various plaintiffs in comparison with other teachers who were employed by the District, a system which enjoyed the highest rating possible, that of triple A. Most of the plaintiffs have since been employed in the teaching profession in other systems. One of the plaintiffs, the one with the most college education, is employed in a college. She had more college hours than many of the teachers employed by the Board, but the Superintendent placed his failure to recommend her because of a personality problem. His testimony indicated she gave the impression that she considered herself superior to other teachers, created unpleasant relationships with others teachers, created disciplinary problems with some of the classes, was resentful toward authority and made it very unpleasant for her principal. Certainly if we forget the intangibles in her instance she would rate above most who were employed, but when we consider that all-important matter of intangibles which must enter into the teaching profession, she does not compare favorably. In the court's opinion, the Superintendent was rather generous in his appraisal of the intangible factors with respect to this particular teacher, for the attitude displayed by this teacher on the witness stand could not but help leave with the court the impression that all he said was true and that she definitely did not meet the intangible requirements. In her testimony she stated that one of the school board members, Richard Chamier, had made certain statements with respect to the negro teachers at one of the meetings held by the committee on integration. The statements are such that lead to confusion and sometimes disorder in the problem of integration. The newspaper and radio representatives who were present at the meeting and who took notes as to what happened, testified that no such statements were made. They were there for the purpose of obtaining newsworthy information, and such statements, if made, would have been used by both in news stories, they stated.

It is unfortunate as to this teacher that she did not recognize, as was recognized and stipulated in the trial of this case, that the District in approaching and solving the integration of the schools was completely fair and moved expeditiously. It is unfortunate when teachers have an attitude such as this teacher has—and I do not mean to say that such attitude is limited to any race or color—but when it does exist it vitally affects the teaching ability of the individual.

[*Progress of Pupils*]

One's hindsight is often better than one's foresight, and while it does not enter into the decision in this matter, it is worthy of note that after the pupils in the system were integrated it was found that virtually without exception for the first half of the year 1955-56, the negro pupils had trouble keeping up in their classes, but that during the second half of the year they were able to do so. It was the opinion of the Superintendent that this was due to the fact that they were not as well grounded in fundamentals as the white pupils with whom they were in classes. This fact supports the analysis of the plaintiffs by the Superintendent. At the time of the trial the Superintendent was no longer employed by the district, having moved to the metropolitan area of St. Louis, where he had a teaching position.

Under the testimony, the facts and circumstances shown in the evidence, the court finds that the plaintiffs have failed to sustain the burden placed upon them, and this applies equally to each plaintiff, that the defendants had a practice, policy, rule or regulation of not

hiring duly qualified applicants of the negro race to teach in the public schools, but the testimony on the other hand shows that the negro teachers were given the same consideration as the white applicants in the hiring of teachers. There is no evidence or circumstance which indicates there was any discrimination by the defendants based solely on account of race or color.

Judgment will accordingly be for the defendants. Attorneys for the defendants will prepare the findings of fact, conclusions of law and judgment to be entered and submit same to the court for entry, first obtaining approval from plaintiffs' attorneys as to form.

CIVIL DISTURBANCES
Interracial—North Carolina

STATE of North Carolina v. James COLE, James Garland MARTIN, et al.

Superior Court, Robeson County, North Carolina, April 7, 1958.

SUMMARY: Two members of a Ku Klux Klan group were indicted and tried for inciting to riot by conducting a rally at a time and place when Indians in the locality were known to be particularily restive because of recent racial incidents. One defendant was convicted and sentenced to be confined in jail for not less than eighteen months nor more than two years; the other was convicted and sentenced to be confined in jail for not less than six months nor more than twelve months. The charge of Judge Clawson Williams to the trial jury is reproduced below.

CHARGE

WILLIAMS, Superior Judge.

Gentlemen of the Jury, this action to which you have been listening so attentively is a criminal action brought by the State of North Carolina against the defendants, James Cole, James Garland Martin and others to the State unknown by name, upon a bill of indictment duly returned by the Grand Jury of this County, as follows: State of North Carolina, Robeson County, Superior Court, January Term, A. D., 1958, the Jurors for the State upon their oath present, that James Cole and James Garland Martin and others to the State unknown, on the 18 day of January in the year of our Lord one thousand nine hundred and fifty-eight, with force and arms, at and in the County aforesaid, together with other persons to the State unknown, of a total number of more than ten, did wilfully, riotously and unlawfully assemble together of their own authority in such manner and under such circumstances as to reasonably create in the minds of firm and courageous persons a well-founded fear of threatening danger to the public peace, to-wit, James Cole, James Garland Martin and others to the State unknown, of a total number of more than ten, while armed with firearms, concealed and unconcealed, to-wit, pistols, rifles and shotguns, did assemble near the town of Maxton for the common purpose of conducting a meeting and rally of the so-called Knights of the Ku Klux Klan, with the common intent to preach racial dissension and to coerce and intimidate the populace, and with the common intent to carry out said purpose in a violent and turbulent manner to the terror of the people, with the common intent mutually to assist one another against all who should oppose them, although they well knew, and had been warned, that their prior conduct and pronouncements against the Indians of Robeson County had incensed and inflamed said Indians against them, and that large numbers of said Indians intended to appear in armed force at said meeting, and that to hold said meeting would cause violence and a breach of the peace, and said James Cole, James Garland Martin and others to the State unknown, of a total number of more than ten, did persist in attempting to hold said meeting to which the general public had been invited, although the Sheriff of Robeson County did then

and there notify the said James Cole, the self-styled leader of said Knights of the Ku Klux Klan that any such action would cause violence and a breach of the peace, and did counsel and warn the said James Cole to disperse his followers to preserve the public order, which said counsel and warning were ignored by said James Cole; and that, as a result of the aforementioned acts and conduct, violence, riot and tumultuous disturbance and breach of the peace did ensue among the persons so gathered, to-wit, said James Cole, James Garland Martin, and their followers, and hundreds of others gathered at their invitation, that guns were fired in anger, persons were injured, to the terror, disturbance and danger to divers citizens of the State then and there being, and that by the acts and conduct aforesaid, the said James Cole, James Garland Martin and others to the State unknown, wilfully and unlawfully did incite a riot, against the form of the statute in such case made and provided and against the peace and dignity of the State, Signed, E. Maurice Braswell, Solicitor, and which charge is brought and allegations made, in violation of the common law referred to as law preserving the public peace, breach of which under such circumstances constitutes a riot, as that term will be defined to you later in the charge. It includes in the classification of offenses against the public peace, unlawful assembly, rout or riot.

[*Not Concerned With Rout*]

You are not concerned here with rout, but you are concerned with unlawful assembly and with the riot charge in the bill.

I instruct you that riot, as defined under the common law and in the construction of statutes passed by the various legislative bodies of various states, there being no statute in this state with respect thereto, has been defined by our Supreme Court to be, a tumultuous disturbance of the peace by three persons or more assembled together of their own authority with intent mutually to assist one another against all who shall oppose them, and afterward putting the design into execution, in terrific and violent manner, whether the object in question be lawful or otherwise. Indictment for riot always must charge the defendants with unlawful assembly, mutual intent to assist one another, and execution of the intent by overt acts, before they can be convicted.

So you see under that definition three elements are necessary to constitute riot. (1) there must be unlawful assembly, which is of itself a common law misdemeanor; (2) there must be mutual intent to assist each other against lawful authority; and (3) it must be put into execution by overt acts of violence.

[*Charged With Inciting*]

The charge in the bill is Inciting to a Riot, as that offense has been defined to you, so that it becomes necessary for you, in order to ascertain whether defendants are guilty as charged, to know what constitutes Inciting a Riot. The gist of that is such conduct as tends to provoke a breach of the peace, although people may have assembled for an innocent and lawful purpose. It means such course of conduct by use of words, sign or language, or any other means, by which one can be urged to action as would naturally lead, or urge, other men to engage in or enter upon action, which would create riot.

So your first inquiry under the allegation of the indictment is to ascertain whether the State has proved the element of *unlawful assembly.*

I instruct you, gentlemen, the burden is upon the State of North Carolina to prove the offense charged in the bill of indictment, by the evidence and beyond a reasonable doubt. When the term, beyond a reasonable doubt, is used, as defining the burden or quantum of burden being upon the State, it does not mean the State has the burden of proving the offense to a mathematical certainty, as you prove mathematically that two and two are four; but reasonable doubt is not a vain, imaginary, fictitious, contentious doubt, but is a sane, rational doubt, growing out of the evidence in the case or lack of sufficient evidence to convince you of the guilt of the defendant. If, after carefully weighing, considering and comparing the evidence in the case, your mind is left in such condition that you cannot say you have an abiding conviction to a moral certainty of the defendants' guilt, then you have a reasonable doubt; otherwise not. It is not doubt prompted by the ingenuity of counsel nor by your own ingenuity, not legitimately warranted by the evidence in the case, nor one prompted by sympathy for defendants or those connected with them; but as I said, is a sane, rational doubt.

[*Scene of Alleged Riot*]

The State says and contends you should find beyond a reasonable doubt that on this night of the eighteenth of January, 1958, a riot took place, or was created in this county about one mile from Maxton, near Presbyterian Junior College; that it was incited, brought about by the defendants and others whose names are unknown to the State; and says and contends you ought to find beyond a reasonable doubt from the evidence that there was an unlawful assembly at that place by the defendants and others unknown to the State and that having assembled unlawfully they proceeded to put into effect their plan and intent to conduct a meeting of the organization known as the Ku Klux Klan, and to resist any persons who might in any way oppose or interfere with the organization of that meeting and in carrying it into execution they mustered in a tumultuous manner; that the conduct that ensued, as disclosed by the evidence, was by various persons, bearing firearms, firing and shooting them in the assembled crowd; and says and contends you should find beyond a reasonable doubt that the riot existed, was created and brought about through unlawful assembly of the defendants; and that as a result of the assembly meeting there, persons who belonged to that organization and came in response to it and acting under control and instruction of defendant, Cole, Martin and others, came to the meeting armed, prepared for trouble and that they were armed for the purpose of assisting each other, in meeting with and overcoming any opposition that might arise as to the way and manner they might conduct the meeting. State further offers evidence tending to show that the members of the Klan came out in automobiles, that they got out of the automobiles with arms, pistols, shotguns and rifles, with them and that they proceeded to make preparations for this meeting by connecting up electric light bulb with some form of generator, generating electric current, and that the generator was there on the premises at the time for the purpose of furnishing light for the meeting, and that the defendants, Cole, with Martin and others, was in the act of operating the generator when the officers arrived at the scene. State further offers evidence tending to show that from time to time as will be recounted later on in the contentions of the parties, defendants, Cole, with Martin and others assumed control over the actions of Klan members present, was consulted by persons, from time to time, who had arms and who came there for instructions as to their conduct; that the defendant, Cole, was requested to give direction or authority about putting up a rope around the field of action, and that in response to the directions which he gave, the rope was not put up at that time, but placement was deferred until later.

[*Right to Assemble*]

With respect to the first element, unlawful assembly, the Constitution and laws of this State guarantee to a person the right to bear arms and right to assemble peaceably for the purpose of registering their grievances. I instruct you that does not give any individual, or any body of individuals, the right to bear arms for unlawful purposes in any respect anywhere.

If you find from the evidence beyond a reasonable doubt that on this occasion they went to this place for an unlawful purpose, armed with deadly weapons, pistols, rifles, guns, blackjacks, for the purpose of conducting a meeting, despite any opposition that might develop, and putting down by force any resistance to such meeting and to mutually assist each other in such conduct, that would constitute unlawful assembly; and if they took steps to carry it into execution in a violent manner, would constitute a riot; and any person who spurred, urged on or provoked such conduct, would be guilty of inciting a riot. "Incite" a riot, comes from the latin word, *incitare*, to urge, to move on. I might give you some definitions of the word incitement, as referred to by some of the law writers, all of which as I told you a few moments ago, embraces the same idea and the gist of the definition is, such conduct as tending to provoke a breach of the peace.

It makes no difference whether the original purpose of assembly be lawful or unlawful. If it be for a lawful purpose and after having so assembled they change their plan or mind about it and adopt an unlawful purpose of assembly, that which has been a lawful assembly is converted into unlawful assembly, and if that be done by mutual consent in carrying out the design or putting the design into execution, with mutual intent to assist each other against any opposition, and violence and tumult result, that would constitute unlawful assembly, and if you

so find beyond a reasonable doubt, you will satisfy the law with respect to that element of the offense alleged.

The next question for you to ascertain or determine is *whether or not a riot ensued.*

I instruct you in that respect, that a riot as I have defined to you under the opinion of our Supreme Court, is a tumultuous disturbance of the peace by three or more assembled, with intent mutually to assist one another against all who shall oppose them, and afterward putting the design into execution, in a tumultuous and violent manner, whether the purpose be lawful or otherwise. So, you see, gentlemen, a riot is a circumstance created by a tumultuous disturbance of the peace, that is a condition brought about through violence and tumult and action or conduct of cross-purpose, by three persons or more. It is not essential, gentlemen, that all three persons should be named in the bill of indictment. I instruct you, however, it is essential that the language of the bill be such as to cover the requisite number to constitute a crime. The language in this bill is sufficient, it being alleged therein that these two defendants, together with other persons of a total number of more than ten, engaged in this common purpose of creating a tumultuous disturbance or breach of the peace.

[*"Riot" Defined*]

The next element of a riot is putting the design or this purpose into effect in a violent and tumultuous manner.

I instruct if you find they met for this purpose with intent mutually to assist each other against all who opposed them, and afterward, put the design into effect, that is with the use of shotguns, rifles, pistols or bludgeons, if you find a riot did ensue by reason of the use of such weapons, then you would find the riot was created by such conduct as you shall find from the evidence beyond a reasonable doubt came about through the use of these weapons.

Upon that, the State says and contends you ought to find beyond a reasonable doubt that both of the defendants are guilty of inciting a riot, that you ought to find beyond a reasonable doubt that a riot took place out there on this night and you ought to find beyond a reasonable doubt that the defendants assembled together with other persons whose names are not known to the jurors for that purpose and for the purpose of mutually assisting each other notwithstanding any resistance that might be put up, and that you should return a verdict of guilty of inciting a riot, in that the conduct of the defendants and others not named, when they appeared on the scene armed with deadly weapons indicated a desire to use force to accomplish their purpose.

[*Conference with Officials*]

The State further says and contends and offers evidence tending to show in support thereof testimony of witness, Sheriff, Malcolm G. McLeod that he is acquainted with the defendants; that on Saturday, January 18th, he went to a place near Maxton, near Hayes Pond on the road leading to Presbyterian Junior College, about a mile from the city limits on Highway 301; that previous to this time, on the Wednesday before, 15th of January, he went to Pembroke in this county and that he had a talk with the municipal officials of the town, Mayor and policemen, and about thirty citizens were present, that they talked about an hour; and that is an area where the Indian population of Robeson County is largely centered; that he left there and got in touch with Sgt. Dodson and Capt. Williams of Troop B, State Highway Patrol, located in Fayetteville, and on Thursday, January 16th, they had a conference and that they went to Marion, South Carolina, the home of the defendant, Cole; that thereafter they sought him out, contacted him over the telephone, and that he is now in court and identified by the witness; that he, Sgt. Dodson and Capt. Williams talked with defendant, Cole, at his residence on Pine Street in Marion, South Carolina, and that he told him that the Indian people in Robeson County had been much upset and concerned about the article appearing in the local paper about the proposed Ku Klux Klan activity here and that there was intense feeling about it, referring to a newspaper item recounting or reciting the burning of cross or crosses in this county; that they talked with defendant, Cole, from thirty minutes to one hour; that the defendant, Martin, was not present; that he told Cole of the high degree of tension and feeling that existed in this county about the Ku Klux Klan and the proposed Klan rally to be held in Maxton on the eighteenth; told him about two previous cross burnings in this county as warnings to the Indian people, told him about the meeting at

Pembroke and that the people had been upset about the meeting and statements in the paper, and that he thought his, Cole's life, would be endangered if he held the meeting in Maxton and there made the same speech he had been making; that the distance from Pembroke to Maxton is eight or ten miles; that Cole didn't make any comment at first when he told him about the meeting on Wednesday in Pembroke; that Cole told him he didn't have any hard feelings toward the Indians, had not seen a newspaper article and made no comment about free assembly; that Cole said he had written a letter to the Sheriff and wouldn't have to mail it since the Sheriff was there; that Cole didn't give any response to request as to holding a meeting and his advice to him; that he, Cole, said he would have to see about it and let them know later; that he didn't hear from Cole and after he didn't get any answer as to whether he would hold a meeting on the night of January 18th, he got in contact with Capt. Williams, Chief of Troop B at Fayetteville and Sgt. Dodson of the State Highway Patrol, and went out on this night on the highway with Deputy Sheriff, Ralph Purcell, accompanying him.

[*Route Described*]

The witness drew the route they traveled, using the blackboard to illustrate; that Mr. Purcell was in uniform at the time and the Sheriff was in plain-clothes; that he and officer Purcell got out of the car when some eight or ten men with guns, rifles and shotguns surrounded them; that the officers identified themselves, went over to these men who had rifles or shotguns in their hands, and asked to see Jimmy Cole, and they walked over with them to where Cole was and there were automobiles parked along the highway or road and one of them had a light on it; and Mr. Cole was working on the power plant, trying to get electricity to the light pole, and the light was burning when they first got there; that the field had been cultivated but not recently; when they first got to the field, there were about two hundred people there, saw some white and some Indians; that he didn't see any women there; that when he first saw Cole he had a talk with him; that the seven or eight men with shotguns and rifles were standing around them when they were talking; that twenty five or thirty Klansmen were there; that he said to Mr. Cole: "I told you how these people felt about this meeting," and Cole said, "Yes, you told me, I didn't want to come and had to come with the other men; I am due protection here for a lawful assembly"; that he, the Sheriff, told Cole he couldn't call that assembly lawful, with men there armed with guns and pistols; and then Martin said something about Cole's wife being in a car; that Cole said to put his wife and children in the car and take them up the road; that Martin was in the presence of Cole a few minutes and that he left; that he saw Martin after the riot across the road and didn't remember seeing him any more; that he saw there also an elderly man whom he had seen at a previous meeting of the Ku Klux Klan at Ivey's Crossroads and loaned his flashlight to, to direct traffic; that the man came up and addressed Cole, "Governor, do you want to put the ropes up now"? and Cole told him not to put them up now, it would only agitate the crowd more; that he saw a loud speaker and microphone near by; that crowds were behind automobiles and were asking for Jim Cole; that Cole did not have on a Klan robe at that time and he saw one hat, which was called and identified as a Ku Klux Klan hat, or riding hat of the Ku Klux Klan; he didn't see a banner at the scene, but heard a firecracker or two go off while he was talking to Cole; talked to Cole about fifteen minutes, then went over to the highway; then the highway patrol came; said he told Cole, "I told you how these people felt about this trouble up here and you might endanger your life by holding the meeting" and he said he was due protection for lawful assembly; that after the highway patrol came up, they took rifles and shotguns away from the Ku Klux Klan and the Indians; that everybody had guns or rifles, everybody had one or two, guns, rifles, and shotguns; that all of the Klansmen he saw practically, had pistols or shotguns; that he heard shooting after he got in the car for four or five minutes, couldn't say how many shots, several hundred; that he went back to the scene with the highway patrolmen and parked in front of the place where the rally was to be held and the patrol was taking guns away from the Klansmen and Indians and getting the Klansmen away as fast as they could; that shooting was going on all the time; that cars were parked on both sides of the highway for a half mile; that from two to three hundred people were out of cars on the field; that the light bulb on the pole was shot out; that Cole was twenty five feet away at that time and was in charge

of the Ku Klux Klan when he first saw him; that tear gas went off right after the light bulb was broken or shot out and he saw people coming down the road rubbing their eyes; that there was a pine thicket across the road and people were running into it; they cleared the field of cars; that all of the officers left about ten or ten-thirty o'clock; that demonstration and shooting was going on for five or ten minutes; that he saw an automobile which had been shot and one or two with tires cut; that he saw a Chevrolet and a Hudson automobile, both pulled in, in damaged condition, tires on one was flat; that he saw twelve or fifteen shotguns and rifles, three or four pistols and some home-made blackjacks, all turned over to the Sheriff's office by the Highway Patrol, listing them as five rifles, four pistols, two homemade blackjacks, one hunting knife, shells, bullets and ammunition which were unloaded from the weapons when the sheriff got them.

[*Weapons in Evidence*]

Then the various weapons were offered in evidence taken from the crowd that night. He further testified that he talked to Cole about his being in St. Pauls and East of Lumberton, told him when he went to his home in Marion and that Cole said the cross burning by members of the Ku Klux Klan was with the permission of the land owner; that he saw Cole at a meeting in October, 1956 in Wishart Township and that Cole was dressed in a purple robe extending to his shoe tops, covered his whole body except neck and head, with a hood over the head; that the cloth was silky rayon type but didn't recall the symbols on it; at Maxton he saw high tension and feeling running high, a quiet apprehension and nerves of the people on edge, some calling for James Cole and hostility was in the air; that Cole made the remark at Maxton that he did not know where he (Cole) was; that he saw James Garland Martin twice and was across the road in the edge of the ditch, was in the custody of Patrolman Jones and that Martin was placed in the patrol car; that the people in Cole's presence were halloing, 'Where is Cole?' and you could see barrels of guns sticking up over the crowd; that he saw a few white people there besides the Klan members, saw twenty five or thirty Klansmen there with rifles and firearms; that a few days following, in Pembroke, the people were asking question, could they carry guns to the rally, and he told them the Constitution gave them the right to bear arms, but told them not to go to the meeting and told Mr. Cole about this feeling and what he had told these people in Pembroke; that Cole had held seven or eight rallies with this one; that he didn't attend but three or four of them and that those were opened with prayer; that Sgt. Dodson, Captain Williams and he went to Marion to talk with Cole and that Cole said he didn't have anything against the Indians; that he told Cole what the newspapers had said and it had stirred up the Indians; that Cole made inquiry as to what newspaper reporter he could call and he told him he could call or go to Bruce Roberts in Maxton about the newspaper account; that Cole told him he had permission of the land owner or occupants of the land in writing; that he investigated it, or had two of his deputies investigate it, and he didn't know whether Cole did it; that in his opinion the land is now owned by Howard Beasley on which the cross was burned; that the instrument shown him has the signature of E. J. Glover thereon; at Ivey's Crossroads, he told Cole not to burn the cross, he didn't think he could legally burn a cross, and went back to crossroads and told him he had been wrong about permit to burn a cross; that at Marion, Cole didn't show him a poster; that he received one in the mails but didn't know from whom.

[*Cole in Charge*]

That he didn't see Cole armed that night; that when he got there he was working on a power plant or generator; that he explained to him how it was going to be if he came up there for that meeting and told him there would probably be trouble if he came up there; thinks Cole was putting gas in the motor when he got to the scene; that Cole had the meeting in charge, that an old man came up and said, "Do you want me to put up ropes," and Cole said, "No, it will only agitate them more"; that several asked him questions from time to time, ten or twelve being around when he was talking to Cole; that Cole gave orders not to put up the ropes; that in his (the witness') observation the ten or twelve men around Cole were members of the Ku Klux Klan, were not robe, were moving in, out and around there, and were asking Cole questions; that he has seen Simeon Oxendine twice since that time; that he warned Cole there would be

trouble if he tried to hold that meeting; that before he left Cole, did not see Cole with a rifle in his hand.

[*Meeting with Martin*]

That he had not seen the defendant, James Garland Martin, before the night of January 18th; that Martin told him he came to the Ku Klux Klan Rally at the invitation of Cole and came with a fellow named Red Morgan; that Martin said somebody gave him a shotgun and he had a pistol, which was his; that he had a pistol and a shotgun; that Martin said he attended a Klan rally at Randleman, that James Cole was there making a talk; that he, Cole, came down from the platform at Randleman rally and told there were thirty thousand half breeds in Robeson County, and he was going to have a rally and would scare them off; this meeting was a week or two before the Maxton rally; that Martin said Cole bought the generator from a colored man in South Carolina and had not paid him for it; that at the previous meeting Cole would get up on the back end of a truck, start talking, and damn the negroes, Ford Motor Company, Phillip Morris Tobacco Company and others; and said if the Pearsall Plan wasn't sufficient, a Smith and Wesson would; that Martin stated he was Titan of the Ku Klux Klan; that after Martin's arrest, his pocketbook was turned over to him, and in the pocketbook was an order for robes, also lease of property near Burlington; Martin said he received a letter from Charlotte headquarters, telling him to take guns to all rallies in the future, it would give them more authority; that Martin said the initiation fee was ten dollars and dues six dollars, one half to go to headquarters and one half to the local Klan; that Cole got one dollar; said that he, Martin, had an old model Mercury, drove it to a town between Greensboro and High Point and came on down with a fellow named Morgan; that four or five carloads came from that vicinity; that this land he went to on this night is South of Maxton in an Indian community; that he didn't see Mrs. Cole that night, and did not indict Cole; that he didn't make the statement that if the Grand Jury didn't return a true bill, that he would swear out a warrant against James Cole; that he didn't tell Martin it would go easier with him if he testified; that he didn't speak to him until yesterday morning when he came in the court room; that he didn't make any speech since that night, when he made statement from the State Highway patrol microphone, that this other Ku Klux meeting started about eight-thirty.

[*Deputies Present*]

That Deputy Sheriff Ralph Purcell went with him to Maxton; that there were two deputies there in civilian clothes, and he located nine deputies out on Highway 15 and highway patrolmen located near by, subject to call; that deputies Morgret and Britt were there, and that he saw Lowry and Oxendine that night near the one hundred watt bulb; that later the lights were off; that he didn't see any Indian there with a gun that he recognized; that he recognized some faces there but didn't know their names.

The State further says and offers evidence tending to show in support thereof testimony of Captain Williams, that he is in charge of Troop B of the State Highway Patrol, stationed in Fayetteville, on this night in question; that he had a communication with Sgt. Dodson and Sheriff McLeod on January 16th and on that day went with Sgt. Dodson and the Sheriff to Marion, South Carolina, on Pine Street to the home of James Cole and there they saw Mr. and Mrs. Cole and a small child; that the Sheriff told Cole these Indians in Pembroke area were angry about the cross burning at St. Pauls and it would be dangerous for him to hold a Klan rally in Maxton as planned; that Cole didn't say whether he would call off the meeting or not, said he didn't want any feelings, didn't have anything against the Indians and wanted to know what newspaper man to contact about it; that reference he made was to cross burning at St. Pauls and another, didn't recall what day it was; didn't recall what was said about the other cross burning; that the Sheriff, Deputy Purcell and Chief of Police Fisher in Maxton went to this field at Hayes Pond to decide what strategy to use on this Saturday night, in the event a riot did occur.

[*Highway Patrol*]

That on this Saturday night, January 18th, about eight fifteen or eight thirty, they had four patrol cars, with four highway patrolmen in each car, at Seven Bridges School approximately six or seven miles from the scene, that as they approached this scene they saw a lot of traffic on

the road, lots of cars parked on the side of the road, estimated there were several hundred people there, barely enough room to get their cars on the shoulder; that he heard shots as they pulled up, and people were ducking behind automobiles; that they were between two crowds, when they ran out on the field; some were getting away or trying to get away in cars and some were pulling them out; that many had firearms; that they moved some white people from the field to the road while the riot was in progress; that they tried to restore order and had reasonable control after a while, but not fully under control for thirty minutes or more; that they disarmed all the people within their reach; that while the shooting was still going on, several of the Indian group shouted, "We will respect the State troopers"; that a hundred or more shots were fired. The weapons shown here were weapons taken that night and delivered to Sheriff McLeod; that the patrolmen and the witness stayed until they got all the cars off the road and went and called a wrecker to get one car off, all the tires on it being flat; that they then walked across the road and saw patrolman Jones have Martin in custody; that Sheriff McLeod came on and got ahead of him; that Martin was arrested at the time for carrying a concealed weapon; that he told patrolman Jones that Martin might have been drunk, but had changed his mind since; that he didn't know whether Martin was drunk or not; didn't know whether Martin was convicted of carrying a concealed weapon and public drunkenness; that a white man there carried two weapons, turned them over to the Sheriff, and they were offered in evidence; that he, the witness, has no personal interest in this case and Martin looked like that night he was in a daze and somebody was holding him up, that Martin refused to give his name, and he formed a hasty opinion he was drunk, didn't examine closely; that Martin was belligerent, would not give his name; that he, the witness, has been Captain of this troop since January 1, 1934; that about eleven o'clock that day he went up to the scene; that the patrolmen placed themselves six or seven miles from the scene, about a ten minute drive away from the scene; that he did not discuss the matter with the Indians; that he went to prevent the trouble taking place; that he couldn't identify who was shooting, there was wild scrambling, couldn't see whether Indians or Whites shooting, Indians were engaged in scuffling with members of the white race, some trying to get in cars, like a tug of war, some near the automobiles and some away from them, couldn't tell whether shooting was by Whites or Indians.

[*Officers Visit Cole*]

Sergeant Dodson, member of the State Highway Patrol, on behalf of the State offered testimony tending to show that on January 16th, in company with Capt. Williams and Sheriff McLeod went to Cole's house; that Sheriff McLeod told Cole about this condition existing near Maxton and the Indians were incensed about the Klan cross burnings in Robeson County and told Cole if he carried out his plan to hold a meeting there, there would be trouble; that Cole said he wasn't sure that he could call it off; that the Sheriff told him he could get the same reporter he carried with him to the cross burnings, to notify them it had been put off. That on Saturday following the visit to Marion, South Carolina, he went to the scene near Hayes Pond in an open field and that there was a riot going on when he got there; that there were a thousand people, all around there, a semi-circle of cars in the field; that there was whooping, halloing and gun fire, sounded like an Indian war; that Captain Williamson and he were calling for order; that when some Indians spied them, they said, 'We respect you fellows, but the Ku Klux Klan has got to leave here'; that he didn't see Cole but saw Martin come toward him from a small thicket of pines; that Martin was armed with two weapons, appeared to be drunk, refused to give his name, and appeared to him to be drunk; that he told him immediately he was under arrest for being drunk and having weapon concealed; that he, Sgt. Dodson, told patrolman, Jones, to take him in custody; that he later told them he was James Garland Martin from Reidsville; that the bottom of the holster Martin wore was visible, but could not see the weapon; that everything was over in thirty or forty minutes after the tear gas was thrown.

[*Newsman's Testimony*]

The State offered testimony of Bruce Roberts, that on this day in January he went to the scene; that he is owner of The Scottish Chief and The Lumberton Post; that he was contacted the week before this meeting by a man named Guy; that he went to a house on Fifth Street in Lumberton

on January 13th and found James Cole there; that Guy and Cole were talking to him and told him they had a couple of crosses to burn and were going to have a parade; that Cole and Guy were wearing civilian clothes; that he left in a car with Howard Taylor and Cole; that Taylor was a man who did odd jobs for him; that he, Roberts, went with Cole and other cars near St. Pauls; that Cole instructed them what to do; that at this parking lot area near St. Pauls were several Ku Klux members in robes and other cars pulled up with Ku Klux Klansmen in them in their robes; that while sitting there in the car for about ten minutes, Cole said they were going to burn a cross in front of an Indian house near there; that Cole put on a Klan robe, about fifteen hooded Klansmen there; that they drove a mile or two and stopped at a house and burned a cross; that Cole was wearing regalia of Ku Klux Klan, purpose with two crosses on the front; that the cross burning was held two miles West of 301; that he took a photograph which was brought in evidence; that Cole said the Indian woman who lived in the house, was having an affair with a white man.

State offered testimony of Patrolman J. S. Jones, tending to show that he was a member of the State Highway Patrol; went to Maxton on this night in question, went with Captain Williams and Sergeant Dodson to the place of the rally about eight o'clock; that he did not go with the Sheriff; that they found other people there, about five hundred, didn't hear anybody talking to Cole; that he did not see Cole at that time; that he had been there approximately an hour when he first saw James Garland Martin, coming from a field across the road from the rally, from where the rally was held; that Martin was staggering across the field, with a shotgun in his hand, had a pistol underneath his jacket and was arrested for carrying a concealed weapon; that a 32 automatic and the shotgun were taken off Martin and he was then taken to the Maxton jail; that he heard several shots fired before he got to the scene, and thereafter that Martin had on a brown jacket at the time and that Martin said he had the shotgun and pistol because he was instructed to come to the meeting armed; that when Martin was walking toward the car with the shotgun, that it was breeched; that Martin was bleary-eyed and staggering when he walked.

State offered testimony of George W. Newman tending to show, that he was in the Army, stationed at Fort Bragg on the 18th of January, 1958; that on the night of the 18th of January, he came to a place near Maxton in an automobile, on the Hayes Pond Road; that he got to the field about eight-thirty in the evening; that he was there for about fifteen minutes, heard gun fire; that he was parked on the road and got out and went toward the shooting; that he got shot in the head, hit in the eye, by the nose, or side of the nose, two pellets in the neck; four in the body; that he didn't have any trouble with the shots, that his eyes and neck are now in good condition; that there are still four shotgun pellets in his body; that he read announcement of the rally to be held, in the Fayetteville Observer; that he went to this place near Maxton with eight other soldiers, one Indian soldier in the bunch, being from New Mexico, not a full-blooded Indian; that he saw lots of cars there full of people and saw one man trying to park his automobile.

[*News Photographer*]

The State next offered Bill Shaw, news photographer with the Fayetteville Observer; that he went to this place near Maxton on the night of January 18, 1958, with Reporter Pat Reeves; saw cars there full of people; that they parked beside the road and saw a man in white robe standing about 15 feet from the road with a shotgun under his arm; that he can't identify there was someone directing traffic, trying to get people to park in the open field there; that he and the reporter waited and later saw some activity up at a parked automobile in the open field, probably a generator in the back of the automobile and he made pictures of the light bulb, which he has identified as shown you; that he was struck in the face by four shotgun pellets and two in the hairline, identifying a photo showing the injuries; that he went to the hospital for treatment; that he didn't know who fired the shots that hit him; that there were several hundred shots fired there that night; that there were white and Indian people there that night; that he saw a cloth banner with letters KKK on it; that the banner was near an automobile, or the parked automobile that had the generator and light there; that he didn't see Cole, saw Martin, who approached the crowd and said no pictures will be taken until the

speaking begins; that there were cat calls, halloing and seemed to be a lot of tension there in the crowd.

[*Reporter Testifies*]

State then offered witness, Charles Craven, reporter with the News and Observer, whose testimony tended to show that on the 18th of January, 1958, he was reporter with the News & Observer, and on that date came to the Hayes Pond Road in Robeson County, accompanied by Thomas Inman, photographer; that when they arrived, saw several cars pull up and stop along side of the road; that they were Ku Klux Klansmen cars, six or seven cars; that he got out and walked toward the cars and some of the men got out of the automobiles; that when they got out, they were armed with shotguns, army carbines and pistols; that they were the only klansmen he saw carrying weapons; that the only klansmen he saw not carrying a weapon was red headed; that he attempted conversation with the klansmen and they stationed themselves sentinel like in the field; that he tried to talk with them and they said, 'The Klan doesn't talk.' That this man was called "Trent" and he was wearing a white robe; that he asked if the meeting was open to the public and the man replied, that it was if the public behaves itself; that they wouldn't tell their names and he had a feeling of apprehension; that they displayed hostility toward him when he tried to talk to this particular individual who wore a white robe and who was called "Trent"; that he took his gun in hand and said he would hate to see young people get shot; that in fifteen or twenty minutes other cars began to arrive and an individual dressed in cowboy boots, cowboy hat and two revolvers, addressed by other members of the crowd as "Tex" stayed in the highway and motioned the cars to come into the field, was saying, 'Klan Meeting', and about one out of every ten cars pulled into the field, others parked at the shoulder of the road; that the Indians began lining themselves along the side of the road; and that he and his photographer walked in the field and were confronted by defendant, Martin, who asked them what they were doing walking around in the dark, on the edge of this field. The photographer asked what about taking pictures, take us over to see Cole; that Martin at that time was armed with a shotgun and pistol; that there was another man with Martin but didn't know his name and he also had a weapon; that Martin and the other man went with them where they found Cole, back in the shadows, facing the Indians, who had not moved on the field; that Sheriff McLeod was with Cole at the time, talking to Cole, said "Cole, although you have leased the field, this is a situation I cannot control, that he had only a small number of deputies there;" at one point that Cole said, 'I know these people; said I just don't need your expressions of that type; that a man bearing a shotgun then came up and said, 'Governor, do you want us to put up a rope now'? that Cole said, 'There is no use agitating the situation by putting up a rope'; that he didn't hear Cole say the meeting would not be held; that he was there before the Indians arrived; that the Klansmen were taking places on the field bearing arms; that he turned and saw them getting out of their cars and were armed at the time; that he heard whooping and cat calls from the Indians after they aligned themselves along the road; that the Indians moved in a body and he didn't see any weapons as they came on the field; didn't see any Indians or Indian take hold of the microphone; that when he was talking to the Sheriff and Mr. Cole he saw weapons; that he didn't see anybody hit on the head; that the picture shown him correctly shows the scene around the microphone; that he was having difficulty doing his job and was intimidated before the Indians arrived; that he was resentful because they wouldn't give him information; that he was capable of giving objective testimony; that there were no overt offers to harm him but there was implication of threats; as he requested information about the picture and asked for it and asked a number of questions, was told the Ku Klux Klan would not talk. That he saw Martin there, saw him twice; that while he and the photographer were in the field to the left Martin and another man came up and asked what the witness was doing there and that he then asked if they could see Cole and he said possibly; that he came back in a few minutes and took them to see Cole; that he, the witness, went to a house nearby; when he came back went across the road from the scene, saw Martin in the custody of highway patrolman Jones; when the firing started, he ran and stumbled in a ditch and a young Indian walked in the ditch; was looking over his shoulders was in low posture, bent over, in ducking position; that next day, Sunday, he went back to the scene and

saw an Indian who had been shot in the face with shotgun pellets; that the implication of threats was in the juggling of firearms, but that the gun wasn't pointed directly at him.

Paul Mason, National Broadcasting Company monitor, offered by the State, testified that he had a series of interviews with Cole near Greensboro; that it was at a Ku Klux Klan rally; that he made a tape recording of the entire Klan meeting that lasted an hour and a half; that Cole identified himself as the Grand Wizard of the Klan; that he and Cole were in a small circle of people; that he asked Cole what he considered the Ku Klux Klan to be and asked him why he had the guns and why he was carrying pistols and he said, "They have a right to carry arms under the Constitution, and I think they speak for themselves; if they don't, they will; that Cole also said he was going down to what he called "Brown Town"; that Cole said he had five guns and money to buy more and as long as the constitution gives me the right; said if the Pearsall is not enough, the Smith and Wesson plan would be.

R. L. Purcell, Deputy Sheriff of Robeson County for twenty-seven years; stated that he went to the place on Hayes Pond road where the meeting was to be held; that he found white people and Indians there; that to his knowledge there were ten Indian families in a radius of a mile from the scene; that he went with the Sheriff to this location on the night of January 18th; that when they got out of the car, they were met by eight white men with guns; that they followed them to where Cole was and Sheriff McLeod told Cole he thought it advisable not to hold the meeting; that Cole said he couldn't see any reason why he should not hold it, but would tone it down some. That the Sheriff told Cole he had better move the women and children out, and defendant, Martin, went where the woman and children were; that Martin had a shotgun and was wearing a jacket; that he and the Sheriff went to the side road and saw Martin in the custody of a highway patrolman; that he heard about a hundred shots there that night; that he saw everything other witnesses testified to and testified to the same thing; that when they went by the white men, they were not making any noise.

That is the gist or synopsis of the evidence. I caution you when arriving at your verdict, to be guided by your recollection and your recollection alone, as to what the evidence was.

I instruct you, gentlemen, if you find from the evidence and beyond a reasonable doubt that the defendant, James Cole, assembled together with two or more other persons of his own authority with mutual consent to assist each other in conducting a meeting or for any unlawful purpose, notwithstanding any resistance that might be put up, and after so assembling put their plan into effect by the use of shotguns and other firearms, and such procedure or conduct was inspired by and urged on, by the defendant, Cole, and others, it would be your duty to return a verdict of guilty of inciting a riot, as to Cole. Unless you so find, you will acquit Cole.

[*Duty of Jury*]

If you find from the evidence and beyond a reasonable doubt that the defendant, Martin, assembled with Cole and two or more other persons of their own authority with mutual consent to assist each other in holding a meeting of the Ku Klux Klan and with the idea of overcoming any resistance they might encounter, and putting the plan into execution after assembling with aforesaid intent, in a violent manner by firing of shotguns and other weapons in the crowd, and such conduct was inspired, urged or brought on by defendant, Martin and others, it would be your duty to return a verdict of guilty of inciting riot as to Martin. Unless you so find, you will acquit Martin.

In this instance, the State contends you ought to find that the circumstances of coming together at the scene was that the defendants had an understanding mutually to assist each other in carrying out the project of having a meeting of this organization, that they were prepared to do battle and armed themselves there for holding the meeting, notwithstanding any resistance or objection made by any person or persons, and that in the execution of this plan, they used the weapons that they brought there and did so, or carried it out in a tumultuous manner and in a violent way; and the State further contends you ought to find that was incited by the conduct of the defendant, Cole, in directing the conduct of the people who were there at the time, and by the defendant, Martin; that Martin was armed for the purpose of carrying it out, and Cole was giving directions as to the preparations to be made, the placing of ropes, lighting, etc., and

the State contends you ought to find that was done for the purpose of bringing about this tumult and this violent conflict between members of the Klan and persons who might be at the rally.

[*Status of Abettor*]

If you are satisfied that was the case, because they and others were carrying weapons in order that they might assert or exert more authority than they would without then, if that were the situation existing at the time and each aiding and abetting the others, in carrying out this plan and design, to hold this meeting, notwithstanding any resistance that might be shown, and in furtherance of a mutual consent to hold the meeting, I instruct you that in misdemeanors there is no distinction between the principal and one who aids and abets in the commission of a crime.

Under the common law, the aider and abettor was principal in the second degree; but in this state we have a statute which provides that there is no difference between the principal and aider and abettor, and one who aids and abets in the commission of a crime, is equally guilty with the actual perpetrator.

A person aids and abets when he has that kind of connection with the commission of a crime, which, at common law, rendered the person guilty as a principal in the second degree. It consisted in being present at the time and place, and in doing some act to render aid to the actual perpetrator of the crime, though without taking a direct share in its commission.

An abettor is one who gives aid and comfort, or who either commands, advises, instigates, or encourages another to commit a crime—a person who, by being present, by words or conduct, assists or incites another to commit the criminal act—or one who so far participates in the commission of a criminal act as to be present, with the knowledge of the perpetrator, for the purpose of assisting, if necessary, in carrying it out.

[*Question of Fact*]

At most, it presents a question of fact for you to determine. Mere presence, the State says and contends emboldens the perpetrator of the crime and gives him courage, as he would not otherwise have, as he had the assurance of assistance.

The defendants contend on the other hand, you ought not to find that the assembly was unlawful, in violation of the statutes, or that they had any mutuality of consent or that they urged, provoked, agitated, or brought about any riot that might have resulted therefrom; and contend you ought not to find there was an unlawful assembly, or that a riot took place; but that if you do so find, that you ought not to find anything was done by either of them and others, to incite or bring it about; and that you ought not to find that either was there present for the purpose of aiding, assisting and abetting others in the commission of any crime, if you find any crime was commited; and contend you should at least have a reasonable doubt as to their guilt and return a verdict of not guilty.

This presents a question of fact for you, the jury, to determine.

In this case, the defendants have seen fit not to go on the stand, which they had a right to do. Prior to 1881, a person charged with a criminal offense or misdemeanor, wasn't competent witness to testify in North Carolina; but in that year the Legislative body of this State passed a new law, providing that a defendant charged with violation of the criminal law, at his own request, but not otherwise, should be a competent witness to testify in his own behalf, and failure to make such request should not be taken at his disadvantage in the case.

So, in arriving at your verdict, you shall not take into consideration the fact that neither of the defendants went upon the witness stand and testified in his own behalf.

This is not a case of prejudice. It is nothing in the world but a simple question of fact for you under your oath as jurors to decide and return a verdict in this case that speaks the truth.

You may retire to your room, weigh, consider and compare all the evidence in this case, return and say for your verdict how you find each defendant, guilty, or not guilty.

* * *

JUDGMENT

As to defendant, James Cole, judgment of the Court is that he be confined in the common jail of Robeson County and assigned to work under supervision of the State Prison Department for a period of not less than eighteen months nor more than two years.

As to defendant, James Garland Martin, judgment of the Court is that he be confined in the common jail of Robeson County and assigned to work under supervision of the State Prison

Department for a period of not less than six months nor more than twelve months.

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APPEAL ENTRIES

To the judgment pronounced, the defendant, James Cole, excepts and appeals therefrom to the Supreme Court of North Carolina. Further notice waived. Appeal bond fixed at $100.00 and appearance bond at $3,000.00. Defendant is allowed ninety days to make up and serve statement of case on appeal. The State is allowed forty five days thereafter to serve countercase or exceptions.

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To the judgment pronounced, the defendant, James Garland Martin, excepts and appeals therefrom to the Supreme Court of North Carolina. Further notice waived. Appeal bond fixed at $100.00 and appearance bond at $1500.00. Defendant is allowed ninety days to make up and serve statement of case on appeal. The State is allowed forty five days thereafter to serve countercase or exceptions.

ELECTIONS
County Unit System—Georgia

William B. HARTSFIELD v. John Sammons BELL, as Chairman of the Georgia State Democratic Executive Committee, et al.

United States District Court, Northern District, Georgia, June 17, 1958, Civ. No. 6385.

SUMMARY: The Mayor of Atlanta, Georgia, filed suit in a federal district court against the chairman of the Georgia State Democratic Executive Committee, alleging the unconstitutionality of the system which assigns to counties an arbitrary unit primary vote not necessarily correlated to population. The complaint seeks injunctions and a declaratory judgment, claiming that such a system as applied to populous counties is in violation of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution. The district court refused to convene a three-judge court, ruling that there was not a substantial question of constitutionality alleged. Decisions of the United States Supreme Court were cited as determinative as to the finality of state action on the question of subdivision of an election territory. Plaintiff then petitioned the United States Supreme Court for a writ of mandamus, which was denied on June 16, 1958. Following this denial, the district court granted the defendant's motion to dismiss on the ground that no substantial federal question had been raised.

SLOAN, District Judge

Opinion Refusing 3-Judge Court

The complaint here seeks interlocutory and permanent injunction and declaratory judgment to restrain adherence to the County Unit System prescribed by Georgia Annotated Code, § 34-3312 et. seq. in the Democratic Primary which it is alleged will be held for the nomination of state officers, it being alleged that said statutes are unconstitutional in that they contravene the equal protection and due process clause of the Fourteenth Amendment to the Constitution of the United States.

The complaint prays for the convening of a three-judge court pursuant to the provisions of Title 28 U.S.C., § 2281 et. seq.

The defendants have filed motions praying that the court declare that the action is not one for a three-judge court.

[*Federal Question Challenged*]

In said motions, the defendants contend that the allegations of the complaint fail to set up a

substantial federal question and that a three-judge court should not be convened.

Said motions came on for hearing under proper orders of this Court. Briefs and written arguments were filed in support of and in opposition to the defendants' motions and lengthy oral arguments for and against said motions were heard by the Court and said motions are now before the Court for determination.

In Ex Parte Poresky, 290 U.S. 30, 32, it is held:

> "That a substantial claim of unconstitutionality is necessary before this court would be authorized to convene a three-judge court and that the law does not require three judges to pass upon this initial question. That the existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint. That the question may be plainly unsubstantial either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of the Supreme Court of the United States as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy."

In South v. Peters, 89 F.Supp. 672, affirmed 339 U.S. 276, the case was in all essentials the same as the case here presented.

The plaintiffs there, South and Fleming, brought suit against the then officers of the Georgia State Democratic Party and others to restrain the operation of the Neill Primary Election Laws, providing for a rule of consolidation by "County Units" instead of by majority or plurality of the entire votes cast in the primary on the ground that under such rule the plaintiffs and their fellow voters in Fulton County, Georgia would be denied equal protection of the laws as against voters in the less populous counties in violation of the Fourteenth Amendment.

The district court, Honorable Samuel H. Sibley, Circuit Judge and Honorable Hoyt Davis, District Judge, held that the statutes did not violate the equal protection clause of the Fourteenth Amendment. Honorable Neil Andrews, District Judge, dissented.

[*History Reviewed*]

In the opinion Judge Sibley, speaking for the Court, reviewed the history of the County Unit System in Georgia showing that it was put into effect under the first State Constitution of Georgia in 1777.

In discussing the case then before the court, Judge Sibley said:

> "Here each qualified person is to be permitted to vote and his vote is to be truly counted; and the whole trouble is that by subdividing the territory into voting units of unequal population, and presumably of unequal voting strength, one unit has an advantage over another unit in political effect. The petitioners complain of no wrong personal to themselves and not common to all the voters in their unit. The wrong, if any, is to their unit."

Further discussing the Neill Primary Act, Judge Sibley states:

> "The Neill Act does not command primaries nor abolish conventions, but tells a party that if it chooses to have a primary it must ascertain its result by the old convention standard, and abide by it, the convention no longer having the final choice of nominees."

In discussing Fulton County's unique position, Judge Sibley further states:

> "This has been accepted as reasonable until Fulton County by its own growth and absorption of other counties has become unique and wishes unique treatment. We are of the opinion as already stated that the judgment and conscience of the Legislature must afford it."

After giving full consideration to the cases on the subdivision of the election territory or nominating territory—Wood v. Broom, 287 U.S. 1; Colegrove v. Green, 328 U.S. 549; Turman v. Duckworth, 68 F.Supp. 744, disposed of in Supreme Court, 329 U.S. 675, and referred to in a per curiam in Colegrove v. Barrett, 330 U.S. 804 and Mac Dougall v. Green, 335 U.S. 281—Judge Sibley, speaking for the Court, concluded:

> "The federal Constitution does not take from the States their right to set up their own internal organization and prescribe the manner of State elections. We do not think the Fourteenth Amendment condemns the Neill Primary Act as to them. If there is political wrong, the remedy is in the State

Legislature which can so amend the Act as to deal with Fulton County specially. Certainly this court of equity should not adjudge the matter."

In Colegrove v. Green, 328 U.S. 549, 556, Mr. Justice Frankfurter observed:

"Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State Legislatures that will apportion properly, or to invoke the ample powers of Congress."

In Mac Dougall v. Green, 335 U.S. 281, the Court said:

"It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States."

In Cox v. Peters, 208 Ga. 498, it was held:

"A party primary held under the provisions of Code § 34-3212 merely chooses candidates or nominees of a political party to be submitted to the entire electorate in the general election, and is not an *election* within the meaning of that term as used in the statutory and constitutional provisions of Georgia conferring upon its citizens the right to vote in an election; and the right to participate in such a primary does not come within the protection of the Fourteenth and Fifteenth Amendments to the Federal Constitution."

On the appeal from the Supreme Court of Georgia to the Supreme Court of the United States a motion to dismiss was filed in that court and the Supreme Court in Cox v. Peters, et al, 342 U.S. 936, said:

"The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question."

Upon a careful review of the authorities dealing with the question of the subdivision of an election territory, the Court is of the opinion that the federal question sought to be raised here is unsubstantial for the reason that the previous decisions of the Supreme Court of the United States foreclose the subject and leave no room for inference that the question sought to be raised can be the subject of controversy.

On the basis of the above ruling, this Court refuses to convene a three-judge court as prayed in the complaint.

This the 1st day of April, 1958.

Order of Dismissal

The defendants in the above stated case have moved to dismiss the complaint upon various grounds, one of the grounds being that the complaint fails to present a substantial federal question and that the Court is therefore without jurisdiction, no diversity of citizenship being alleged.

This Court, on April 1, 1958, entered an order refusing to convene a three-judge court, pursuant to the provisions of Title 28, U.S.C., § 2281, on the ground that the federal question sought to be raised in the complaint is unsubstantial "for the reason that the previous decisions of the Supreme Court of the United States foreclose the subject and leave no room for inference that the question sought to be raised can be the subject of controversy."

After this ruling by the Court, plaintiff filed in the Supreme Court of the United States a "Motion For Leave To File Petition For A Writ Of Mandamus, And Petition For A Writ Of Mandamus."

On June 16, 1958, the Supreme Court of the United States denied plaintiff's motion, and defendants' motions to dismiss are now properly before the Court for determination.

The Court being still of the opinion that the federal question sought to be raised is unsubstantial, and that the Court is without jurisdiction since no diversity of citizenship is alleged, it is

ORDERED that defendants' motions to dismiss be, and they are hereby sustained and the complaint is hereby dismissed.

This the 17th day of June, 1958.

EMPLOYMENT
Labor Unions—Federal Statutes

Curtis H. WASHINGTON et al. v. CENTRAL OF GEORGIA RAILWAY CO., et al.

United States District Court, Middle District, Georgia, Macon Division, June 27, 1958, Civ. No. 711.

SUMMARY: Negro firemen brought a class action in 1949 in a federal district court in Georgia, seeking to enjoin the railway company and the Brotherhood of Locomotive Firemen and Enginemen and other defendants from enforcing a collective bargaining agreement claimed to discriminate solely on the basis of race or color. The agreement referred to Negro firemen as "non-promotable" and limited them to 50% in each class of service. A consent decree was entered in the suit in 1952, permanently enjoining the defendants from such racial discrimination. In 1957, five Negroes were allowed to intervene in the case and filed a petition against the railway and the brotherhood for a rule to show cause why they should not be held in civil contempt for violation of the injunction. The intervenors claimed that the defendants, by adding "swing men" to take certain runs from individual firemen had reduced the intervenors' mileage and pay solely on the basis of their race or color. They further alleged that the addition of "swing men" accrued solely to the benefit of the white firemen. The court found that the addition of "swing men" had reduced the mileage and pay of white firemen as well as Negro firemen, that the runs were open to the bidder with the highest seniority without regard to race or color, and that racial discrimination had not been proved.

BOOTLE, District Judge:

The above action was instituted in this Court on December 12th, 1949, by a number of Negro firemen on the Central of Georgia Railway Company to strike down racial discrimination then practiced under the Southeastern Carriers' Conference Agreement of February 18th, 1941 limiting Negro firemen, euphemistically referred to therein as non-promotable firemen, to 50% in each class of service. The action accomplished its purpose in that on March 25th, 1952, Judge A. B. Conger signed a consent decree permanently enjoining all defendants, including the Central and the Brotherhood of Locomotive Firemen and Enginemen.

> "(a) from enforcing the Southeastern Carriers' Conference Agreement of February 18, 1941, or any other written or oral agreements, or carrying on any practices under such agreements, insofar as said agreements or practices discriminate, on the ground of their race or color, against Negro firemen in their employment or occupation as firemen on steam locomotives or as helpers on Diesel locomotives, or (b) from denying to plaintiffs or other members of their class their respective rights to assignments as firemen on steam locomotives or as helpers on diesel locomotives based upon seniority and qualifications because they are Negroes or because they have not been permitted or required to take or pass examinations to qualify as engineers . . ."

On December 18, 1957, Al Marshall, Major Simpson, Will Covington, Jim Mullins and Marion Vincent, five Negro firemen employed by the Central, filed their motion to intervene in said case and to be permitted to file their petition against the Central and the Brotherhood for a rule to show cause why they should not be held in civil contempt for certain alleged violations of said injunction. The intervention was allowed, the petition filed and rule to show cause issued.

The interveners have made the following showing. Their employment by Central antedates the injunction and they are entitled to the benefits thereof. The Brotherhood is their exclusive bargaining representative with the Central under the Railway Labor Act. They are excluded from membership in the Brotherhood because of their color. Due to the long standing rule applicable on the Central that engineers must have experience as firemen and that Negroes may not become engineers, Negro firemen have become the senior firemen having the right to choice runs and all other rights accompanying high seniority. One of the choice runs on the Central is the freight run from Columbus, Georgia to Birming-

ham, Alabama on the Columbus Division. For 20 years or more prior to March, 1957, this run was worked for the most part by five Negro firemen with top seniority who shared its mileage. As of the time of the filing of this intervention these runs were held by the five interveners and their mileage averaged about 3760 miles in a 30 day month and 3610 miles in a 31 day month, the smaller mileage in the longer month being due to the men's being "held off" so as not to exceed the maximum of 3800 miles per month, as prescribed in the Schedule of Wages, Rules and Regulations hereinafter mentioned.

[*"Swing Man" Added*]

On or about March 1, 1957, pursuant to an agreement between the Brotherhood and the Central a "swing man" was added to this regular assigned run. He takes the fifth run of each man four times a month causing each of the five men to lose mileage and pay. Since the swing man has been added each of these five regular assigned jobs lose 628 miles per month representing a loss of pay of something like $100.00 per month for each man. Intervener Marshall testified that it reduced his monthly pay from approximately $650.00 to approximately $580.00.

Upon the basic facts above found the parties rest radically diverse contentions. Interveners say that in adding this swing man and in thus taking mileage and pay from them, the Brotherhood and the Central have flagrantly violated the injunctive decree of this Court in that they have thus been "enforcing . . . written or oral agreements [and] carrying on . . . practices [which] discriminate, on the ground of their race or color, against Negro firemen in their employment or occupation as firemen on steam locomotives or as helpers on diesel locomotives. . . ."

The Central and the Brotherhood, on the other hand, emphatically deny both the alleged intent to discriminate and the alleged fact of discrimination.

[*Contentions Outlined*]

Interveners' counsel succinctly outlined their contentions as follows: "We do not contend . . . that these outstanding Federal decrees [similar decrees were issued in other Courts] prevent any reduction in the pay and privileges of Negro firemen of any kind. Any reduction which is made equally across the board, affecting all, certainly is not a discrimination against Negro firemen. We do not claim that the injunctions have insulated these men in a position where they can come to a federal court and resist any type of reduction in their pay or mileage. That is certainly not what was intended, but we say that discriminatory reduction where we can show that the Negroes have been selected for the application of an adverse rule such as this one and that whites are not similarly subjected, that, we say, of course, is the exact discrimination which the very terms of the consent decree prohibit . . . I have thought about just what discrimination means, and what it takes to prove it, and I think what I mean in this case by discrimination is the selective—the racially selective application of reduction in job rights. That is what I mean, and I think that is what we intend to prove; the curtailments in the privileges and payments of jobs effected against Negroes but not against whites basically, and I think that is the kind of discrimination covered and the kind we will show has been affected in this case."

Interveners claim the existence of certain matters "in aggravation of this discriminatory reduction in their mileage", namely, that (1) they were "frozen" in these reduced mileage jobs and denied their contractual right to shift to another job; (2) this inroad upon their seniority privileges and pay and mileage was totally racially selective in the sense that no comparable reduction of the pay of white firemen was made on the Columbus division or other divisions of the Central; (3) their pay loss necessarily goes to white firemen and (4) a system of discrimination has been built into the railroad industry in that only white firemen were promotable to jobs as engineers; that thus an engineer, always a white man, may have seniority as a fireman, engineer, hostler and hostler helper, whereas a Negro fireman has seniority only as a fireman and that consequently a demoted engineer who is "back firing", in competition with interveners, has the possibility of supplementing his pay as a fireman with pay earned in another capacity, whereas such possibility is not open to interveners.

[*Deny Right to Greater Mileage*]

Counsel for the Brotherhood, after denying discrimination and discriminatory intent, deny

also that interveners have a right to run a greater mileage per month than other firemen generally run and deny that adjusting their mileage to bring them in line with mileage run by other firemen constituted hostile discrimination in any legal sense of the word. The Brotherhood says further that this swing man was added in keeping with the Brotherhood's policy nationally and locally to spread the work among all employees for whom it acts as bargaining agent, and that this policy has been, and is being, applied discriminately not only to the Columbus division but to all divisions and districts of the Central and not only to Negro firemen but to white firemen as well.

The Central's position is that prior to March 1, 1957, Article 26, Section 2(a) and (f) of the Schedule of Wages, Rules and Regulations governing locomotive firemen read as follows:

"SENIORITY, MILEAGE AND PROMOTION

"Section 2. REDUCTION OF FIREMEN'S WORKING LISTS: When from any cause it becomes necessary to reduce the number of firemen on the firemen's working lists on any seniority districts, the following rules will apply:

"(a) No reductions will be made so long as those in assigned or extra passenger service are averaging the equivalent of 4,000 miles per month; in pooled, chain-gang freight or any other assigned service, paying freight rates are averaging the equivalent of 3,200 miles per month; on the road extra lists are averaging the equivalent of 3,200 miles per month; or those on the yard extra lists are averaging the equivalent of 32 days per month.

* * *

"(f) In the regulation of assigned or extra passenger service, a sufficient number of men will be assigned to keep the mileage or equivalent thereof within the limitations of 4,000 and 4,800 miles per month; in assigned, pooled, chain-gang or any other service paying freight rates, a sufficient number of firemen will be assigned to keep the mileage or the equivalent thereof within the limitations of 3,200 and 3,800 miles per month. Neither the maximum nor the minimum is guaranteed."

that due in part to dieselization, there has been a reduction in need for firemen and engineers, and by reason of this reduced need and in an effort to distribute the available work among as many as possible of the employees, both Negro and white, the Brotherhood petitioned the Central in accordance with the Railway Labor Act for a revision of the Article and Section above quoted so as to reduce from a minimum of 3,200 to a minimum of 3,000 the number of miles a fireman, be he white or Negro, in freight or any other assigned service paying freight rates would be entitled to make per month before there could be a reduction by the Central in the "firemen's working lists", that is a roster from which men for trains are taken according to seniority and entirely without regard to race; the Central, in good faith, consented to said request and, accordingly, Article 26, Section 2(a) and (f) was re-written, changing in Section 2(a) the figure 4,000 to 3,800, the figure 3,200 to 3,000 and in the last line thereof "32 days" to "26 days", and changing in Section 2(f) the figure 4,000 to 3,800 and the figure 3,200 to 3,000, this agreement having been entered into on February 21, 1957, to become effective March 1, 1957; under the amended agreement it was possible to add a swing man on the Columbus to Birmingham freight run without violating the new minimum of 3,000 miles per month; the addition of this swing man was also provided for in Section 2(h) of Article 26, which reads:

"(h) To keep within the mileage regulations set forth in this section, additional crews may be added or swing men used to relieve the regular men on specified days. If regulation cannot be made as provided herein, men will be required to lay off so that the equivalent of 4,800 miles in passenger service, or 3,800 miles in other assigned service, will not be exceeded.";

the sixth, or swing man's, job was bulletined in accordance with the contract between the Central and the Brotherhood and has been filled strictly according to seniority and entirely without regard to an employee's race; and insofar as the Central is concerned the amended Article 26, Section 2(a) and (f) has been applied uniformly to all firemen, both white and Negro, wholly without discrimination against any employee or group of employees.

[*Central Granted Dismissal*]

At the conclusion of the evidence, the Central

moved to be dismissed as a party defendant upon the ground that there was no evidence tending to show any discriminatory acts by it. Interveners expressly consented that said motion be granted while the Brotherhood took no position with regard to said motion. Thereupon, the Court entered an order exonerating the Central with regard to the contempt charges, but retaining it as a party defendant so that it would be subject to such further order or orders as may be entered in the case.

Under the law, the burden is on the moving party to show the facts necessary to establish contempt. This burden must be carried by clear and convincing evidence. While proof beyond a reasonable doubt is not required, the authorities sometimes say that more than preponderance of proof is required. "Whatever qualifying adjective may be used in the various opinions, they are unanimous that a heavy burden of proof rests upon the party urging contempt." Kansas City Power & Light Co. v. National L. R. Board, 137 F.2d 77, 79 (8th Cir. 1943), 15 Cyc. Fed. Pro. Sec. 87.87 (3d ed. 1953). Added to the burden above outlined which is applicable to all contempt cases, interveners have the burden here of showing not only discrimination, but discrimination "on the ground of their race or color", such being the terms of the decree.

[*No Discrimination Found*]

After a careful consideration of all of the interveners' contentions and all evidence adduced, this Court is convinced that no discrimination, and hence no contempt, has been shown. I find that the Brotherhood, in good faith both nationally and locally, adopted a policy of distributing the work among firemen represented by it as bargaining agent. This policy has been, and is being, applied not only on the Central but on other railroads. It is not a surprising policy in view of the reduced need for firemen. One diesel engine pulls longer trains than the old steam locomotive engine and one fireman, or helper on diesel locomotives as he is now called, with one engineer operates multiple diesel units. On the Central, this policy has been, and is being, applied not only to interveners but to any and all firemen to whom mileage conditions render it applicable, and it is applied not only on the Columbus division, but on all divisions and districts where circumstances permit. The Central has three divisions, Savannah, Macon and Columbus, the Savannah division having only one district, namely, the Savannah district; the Macon Division having two districts, namely, the Atlanta and the Southwestern and the Columbus division having two districts, namely, the Columbus district and the Cedartown district. No racial discrimination was involved in adding this swing man. This additional job was not created for a white man. Interveners allege in Exhibit B, the affidavit of Al Marshall attached to their petition, that the swing job was held by R. B. Gable, a white man, who, although junior in seniority to Negro firemen from whom he takes mileage, is permitted to make mileage and pay equal to and greater than the mileage and pay of the senior Negro firemen from whom he takes his mileage. I find, however, that this job was, in accordance with the applicable agreement between the Central and the Brotherhood, regularly bulletined for the first five days in March, 1957 and was available to the highest seniority bidder who turned out to be Will Covington, one of the five interveners. He bid this job in on March 6, 1957 and held the run until March 31, 1957. The white man, Gable, may have held the run from the extra board during the first five days of March while it was being bulletined. Later, he was swing man from April 18, to May 31, August 29 to September 8, and December 1 to December 17. It is true, therefore, that this swing job, like all other firing jobs on Central, was open to the highest bidder regardless of race or color and there is considerable turnover in some of these jobs according to the bidding.

[*"Swing Man" Not New*]

The use of a swing man on the Central is not new. As above shown, swing men are provided for by Section 2(h) of Article 26, of the Schedule of Wages, Rules and Regulations. Mr. W. M. Ector, the Central's superintendent on the Columbus division, found a swing man in passenger train service when he came to Columbus in 1953. Three passenger trains were being operated to Birmingham and the five firemen assigned to these trains were four colored and one white. Four passenger trains were being operated to Atlanta and the three firemen assigned to them were two colored and one white. In March, 1953, a white man was put on these runs as a swing man, swinging on both the Birmingham run and the Atlanta run and

taking mileage from both Negro and white firemen and making a little more than the regular firemen. There is a swing man on the Savannah division now having been there approximately five years, although no swing men have been added in that division in the last three years. William E. Mitchell, Vice-President of the Brotherhood, testified that swing men are used throughout the country as a general practice and related an instance in 1953 on the Atlantic Coast Line in Georgia where white firemen, members of the Brotherhood, were challenging its authority to add a man to an assigned run thereby bringing the mileage of these men below the minimum prescribed by the rules. The man was added, the mileage reduced and this action was affirmed through all the appellate procedure of the Brotherhood.

The fact that the minimum monthly mileage was reduced from 3,200 to 3,000 has made it possible to keep men in pools who would otherwise have been removed, thus saving jobs, and has made it possible to add men to pools and on extra boards, thus creating more jobs. Five specific instances were disclosed. (1) During the first half of May, 1957, in the Southwestern district of the Macon division there were in a freight service pool three white and two colored firemen making a total 15 day mileage of 9,366 or 1,873 miles per man. The reduced mileage agreement permitted the addition of a sixth man for the second half of the month when the total mileage was 10,286. The effect of adding the sixth man was to take away from each of the three white and two colored firemen 343 miles for the month. (2) For the first half of September, 1957 in the Southwestern district of the Macon division there were in pool freight service five white and one Negro firemen each making for said half month a mileage of 1500. Had it not been for the reduced mileage agreement a man would have been taken from the pool. During the second half of the month the six men made 1,488 miles each. If, during the second half there had been only five men in the pool the average for said half would have been 1,786 miles. Thus, but for the reduced mileage agreement, five of these men would have earned 298 miles more than they did. (3) On an extra board in the Atlanta district of the Macon division for the second half of April, 1957 because of the new rule and the addition of a sixth man five white firemen lost 373 miles per man. (4) On an extra board in the Columbus division Cedartown district because of the new rule three white firemen lost 773 miles each for the second half of August, 1957. (5) On March 16, 1957, a man was added to the extra board on the Savannah division, this being made possible by the reduced mileage agreement.

[*No Aggravation*]

Coming now to the four instances claimed as aggravation of the alleged discrimination, while it might suffice to say that there can be no aggravation of discrimination in the absence of discrimination, an analysis of these claims is to be preferred.

Interveners' claim that they were frozen in these reduced mileage jobs and thereby denied their contractual right to shift to others would be serious, if substantiated. Certainly, if these men were, because of their race, denied the right to assert their firing seniority with respect to any job open to white men because of firing seniority, they would be entitled to quick and certain relief. Notwithstanding the fact that this claim was not mentioned by interveners in their pleadings, the Court, nevertheless, ruled at the trial that they were entitled to show the overall picture of what was being done, the consequences of it, the background, the setting and how it all operated. This particular claim is based upon interveners' interpretation of Section 6(d) of the Schedule of Wages, Rules and Regulations and particularly upon that portion herein underscored, which section reads as follows:

> "(d) Changes of time tables, of schedules, and of rates of pay do not constitute changes in working conditions that will warrant runs to be bulletined. *Runs will be bulletined when miles are added to or taken from the run*, or where the terminal or lay-over of such runs are changed. This is to apply to all men in engine service, except on local freight schedules which are changed three hours or more." (Emphasis supplied).

Admittedly, interveners' runs as distinguished from the new swing run were not bulletined and interveners point out, therefore, that they were not permitted to roll a junior fireman off his job, but would have to remain on their old jobs until some other job was advertised at which time concededly they could bid. At most, therefore, this is a claim of a temporary freeze.

Apparently, this claim is not taken or asserted too seriously by interveners. Not only was it not mentioned in their pleadings, but their counsel, in outlining their contentions to the Court, said with reference to this claim: "And, as I said before, this is not material to the case but aggravates what happened to these men, in that it reduced their mileage and actually froze them into that reduced mileage. But it is not that against which we seek relief, but against the reduction in mileage." While intervener Marshall testified that if his job had been bulletined there were two other jobs he could have got, I find that one of these jobs was bulletined subsequent to March, 1957 and that he did not take it then because he preferred to stay where he was. When he was asked whether, if the other one had been bulletined he would have changed his mind about it as he did about the one which was bulletined, he stated: "Maybe I could have; I don't know." This particular contention presents, at most, a question of interpretation of Section 6(d). Interveners claim that under this section their jobs should have been bulletined. The Brotherhood contends, on the other hand, that when a swing man is added only the swing man's job should be bulletined. The Brotherhood's position is that the language of the rule "runs will be bulletined when miles are added to or taken from the run" relates to the run itself and not to the man, and that if the run is lessened, for instance where the terminal is changed, the run will be bulletined, whereas, if the runs remain the same they are not to be bulletined even though a swing man is added thereby causing the firemen to earn less from their runs. The General Chairman of the General Committee of the Brotherhood, who has held that position since June 1, 1953 and who has been employed by the Central for approximately 15 years, testified that such has been the interpretation of this section ever since he has known about it. There is no contention that this section has ever been applied in this type situation other than in the same manner it was applied here. Therefore, no discriminatory application of this section has been shown.

The claim that no comparable reduction in the pay of white firemen was made has been fully covered.

Interveners' claims by way of aggravation that their pay loss necessarily goes to white firemen and that a Negro fireman cannot supplement his earnings while a white fireman holding seniority in other lines of work may do so both stem from the railroad and Brotherhood discrimination against Negro firemen by denying to them the right to be promoted to engineers' jobs. Interveners' counsel, himself, answered these contentions in his opening statement when, in reply to the Court's inquiry: "That is because one is promotable and one is not?", said:

> "That aggravation results from that fact, that's right. But we, of course, do not seek any relief with respect to that. It is one that has been built in by virtue of the discrimination practiced for 50 years and there is no longer any solution to that, so we do not seek any redress against it. We merely point it out to illustrate that this new reduction in the mileage has caused a more aggravated situation to arise."

Of course, it is only partially true that interveners' pay loss goes to white firemen. Immediately, their pay loss, as has been demonstrated, goes to the swing man, who most generally is a Negro because of the Negroes' high seniority as firemen. It may go, more or less temporarily, to a demoted engineer who claims a firing assignment until he can return to duty as an engineer. To the extent that the addition of the swing man creates one more firing job in the overall firing picture for the benefit of a junior fireman way down on the list, this pay loss does benefit a white junior fireman. This is necessarily so because under the old 50% rule, stricken down by the injunction in this case, over a long period only white firemen were added as employees and so many were added that during the last fifteen years no new firemen, white or colored, have been employed in the Columbus division. The identity of firemen at the bottom of the seniority list, therefore, results from discrimination which antedated the injunction and which the injunction did not undertake to correct except for the future. With respect to these contentions, therefore, the respondents cannot be adjudged in contempt for failing to do more than the injunction required.

[*Effect of Oliphant Case*]

In the case of Oliphant v. Brotherhood of Locomotive Fire. & Eng., 156 F.Supp. 89, 90 (N.D. Ohio, 1957), the main object of which is to compel the Brotherhood to admit Negro fire-

men to membership, certain acts of discrimination were alleged including the addition of this swing man involved in this case, and Al Marshall, one of the interveners here, testified there covering this common feature or aspect of the two cases. In the opinion in that case, Chief Judge Jones wrote:

> "It is the plaintiffs' position that the Brotherhood has never represented the Negro workers on equal terms with the white workers, that the United States Supreme Court in Steele v. Louisville and Nashville R. R., 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173, recognized at least one instance of this unequal treatment and ordered the Brotherhood to cease this discrimination, and that the Brotherhood continues to exercise discrimination in its representation, particularly in (1) reducing the minimum mileage requirements for firemen, which has the effect of reducing the monthly income of the Negroes; (2) applying the 'gouge' rule in such a way as to reduce earnings of the Negroes; (3) applying the mileage rules to firemen and not to demoted engineers; and (4) bargaining for a compulsory retirement at age 70. For reasons which shall appear later, these alleged acts of discrimination will not be discussed in detail, but it should be noted that as to (3) above, proof was mainly in the form of opinion and was denied by Brotherhood officials, while (1), (2) and (4) are legitimate practices used by most unions for reasons other than discrimination, and since they apply to all who come within the terms of the rule involved, whether the individuals are white or colored, this court cannot state definitely that this Brotherhood adopted these practices for the purpose of discrimination against the Negroes."

Collective bargaining contracts and arrangements worked out in good faith between the statutory representative of a craft and the employer are not vitiated merely because they "may have unfavorable effects on some of the members of the craft represented." Steele v. Louisville and Nashville R. R. Co., 323 U.S. 192, 203, 89 L.Ed. 173, 183 (1944). See also Ford Motor Co. v. Huffman, 345 U.S. 330, 97 L.Ed. 1048; Aeronautical Industrial Dist. Lodge 727 v. Campbell, 337 U.S. 521, 93 L.Ed. 1513.

Let counsel for respondents prepare a judgment in accordance herewith and submit the same to counsel for interveners who shall have five days for suggestions as to form.

This 27th day of June, 1958.

GOVERNMENTAL FACILITIES
Golf Courses—Florida

E. B. GRIFFIS, Jr., et al. v. the CITY OF FORT LAUDERDALE et al.

Supreme Court of Florida, June 18, 1958, 104 So.2d 33.

SUMMARY: Negroes in Fort Lauderdale filed a suit in the Circuit Court of Broward County to enjoin the City of Fort Lauderdale from selling its golf course to the Fort Lauderdale Men's Golf Association, Inc. In a prior decision a federal district court had issued an injunction requiring admission to the golf course without regard to race or color. *Moorhead v. City of Fort Lauderdale*, 152 F.Supp. 131, 2 Race Rel. L. Rep. 409. The circuit court denied the injunction. On appeal, the Supreme Court of Florida affirmed the lower court's decision, holding that the city could dispose of the recreational facility pursuant to its legislative authority, that the notice of the sale was sufficient, and that the highest bid made was adequate consideration.

Before TERRELL, C.J., THOMAS, ROBERTS and THORNAL, JJ., and STURGIS, District Judge.

PER CURIAM:

This is an appeal by plaintiffs-appellants from an adverse decree entered in a suit filed by them in the court below to enjoin the defendant-appellee, City of Fort Lauderdale, from selling its golf course to the defendant-appellee, Fort

Lauderdale Men's Golf Association, Inc. The grounds of the complaint for an injunction were (1) that the proposed selling price was inadequate, (2) that the sale was not for a lawful purpose nor in the best interests of the citizens and taxpayers of the City because it was made for the purpose of avoiding a decree of a federal court "integrating" the golf course, and (3) that the sale was violative of the plaintiffs' rights under the due process clause of the Fourteenth Amendment to the federal constitution.

It is first contended on this appeal that the Chancellor erred in striking ground (2) above, upon motion of the defendant-appellees, from the complaint. We find no error here. The obvious force and effect of the federal decree was that any golf course owned and operated by the City must be open to all the citizens of the community; but, certainly, it did not affect the right of the City to dispose of this or any other recreational facility, pursuant to its legislative authority so to do, when in its judgment such facility was no longer needed for the use of its citizens, since this is a local administrative question. The reasons for selling the golf course were set forth in the Resolution of the City Commission. These reasons had nothing to do with integration and were ample justification for its sale from an administrative viewpoint. The fact that some members of the Commission may possibly have entertained a private individual thought that the sale of the golf course would avoid the problem of integrating it—either with or without a federal decree—is immaterial. There was, then, no error in striking ground (2) from the complaint.

[*Requirements Tracked Exactly*]

It is also contended that the trial judge erred in ruling that the sale of the property did not violate the plaintiff's rights under the due process clause of the Fourteenth Amendment of the federal constitution. The short answer to this is that the City tracked exactly the legislative requirements for the sale of its property. Its Resolution approving the sale was generally publicized and the property duly advertised for sale. It was an open sale in which any person or group of persons, of whatever race, creed or color, could have submitted a bid for the property. Having failed to make an offer for the property, the plaintiffs cannot now be heard to complain because it was sold to the defendant-appellee, the Fort Lauderdale Men's Golf Association.

The remaining question argued is the adequacy of the consideration for which the property was sold. We have carefully examined the record and find that the trial court was entirely justified in holding that the highest bid offered, in the amount of $562,400.00, constituted adequate consideration for the sale of the property.

In summary, the City had authority under the law to make the sale, the notice of the sale was sufficient, and the highest bid made was adequate consideration. No lawful impediment to the sale having been made to appear, the judgment of the lower court approving the sale is hereby

Affirmed.

GOVERNMENTAL FACILITIES

Golf Courses—North Carolina

STATE of North Carolina v. Phillip COOKE, et al.

Supreme Court of North Carolina, June 4, 1958, 193 S.E.2d 846.

SUMMARY: Six Negro citizens of Greensboro, North Carolina, applied for and were denied permission to play on a municipally-owned golf course which had been leased to a private operator. When they attempted to play without permission, they were arrested and charged with trespass. From a conviction in a municipal court they appealed to the superior court where they were again convicted. They then appealed to the North Carolina Supreme Court.

That court found that the original warrants under which they had been convicted were defective in that the name of the lessee of the golf course was erroneously entered and that there was no provision for amendment under the North Carolina law. 98 S.E.2d 885, 2 Race Rel. L. Rep. 818 (1957). In a new action the defendants were again convicted in the municipal court. The superior court affirmed. On appeal, the Supreme Court of North Carolina affirmed, holding that defendants had not been placed in double jeopardy and that the court could not take judicial notice of an alleged federal court adjudication that defendants had been denied the privilege of using the recreational facility because of their race or color. [The defendants in this case were plaintiffs in an action in federal district court brought against the city. In that case the court enjoined the city and the lessee of the golf course in question from denying admission to the golf course solely on the basis of race or color. *Simkins v. City of Greensboro*, 149 F.Supp. 562, 2 Race Rel. L. Rep. 605 (M.D. N.C. 1957); affirmed, 246 F.2d 425, 2 Race Rel. L. Rep. 817.]

SYLLABUS BY COURT

Appeal by defendants from Fountain, S. J., February 3, 1958 Criminal Term of Guilford (Greensboro Division).

On 2 December 1957 a warrant issued from the Greensboro Municipal-County Court for Phillip Cooke, charging that on 7 December 1955 he "did unlawfully and willfully enter and trespass upon the premises of Gillespie Park Club, Inc., after having been forbidden to enter said premises."

Similar warrants were on the same day issued for each of the other defendants.

Defendants moved in the Municipal-County Court to quash the warrants. Their motions were overruled. They then entered pleas of not guilty. The court, after hearing the evidence, found each defendant guilty and imposed sentence. Defendants appealed to the Superior Court.

* * *

OPINION

RODMAN, J.

The cases were, without objection, consolidated for trial in the Superior Court.

Before pleading to the merits in the Superior Court, defendants renewed their motions to quash as originally made in the Municipal-County Court. The motions made in apt time were overruled by the court.

Before considering the merits of the cases, we must ascertain if defendants were properly called upon to answer the criminal charges leveled against them. The motions to quash assign three reasons why defendants should not be called upon to answer the allegation that they violated the criminal laws of the State of North Carolina.

State v. Cooke, 246 N.C. 518, 98 S.E.2d 885, is relied upon for two of the three reasons assigned. An examination of that case is necessary to assay the merits of the motions. The crime with which defendants stand charged is a misdemeanor punishable by fine of $50 or imprisonment for thirty days, G.S. 14-134. The Municipal-County Court has jurisdiction of the offense charged. In December 1955 these defendants were charged in warrants issuing from that court with trespassing on the property of *Gillespie Park Golf Course*. They were convicted and appealed to the Superior Court. That court's jurisdiction of the cases then before it was derivative and not original. In the exercise of its derivative jurisdiction, it was confined to an inquiry as to the truth of the charges contained in the warrants issuing from the Municipal-County Court. It could not, in the exercise of that jurisdiction, try defendants for a different crime. Nevertheless, the warrants were amended in the Superior Court to charge defendants with a trespass on the property of *Gillespie Park Golf Club, Inc.* Defendants were convicted of the crime charged in the amended warrants. Defendants appealed their conviction to this Court. We held that the amended warrant, by substituting another property owner, charged a different crime from the crime originally charged, and for that reason the Superior Court could not, in the exercise of its derivative jurisdiction, try defendants on the new criminal charge.

[*Sentence a Nullity*]

Since the conviction by a court without jurisdiction to hear and determine the guilt or innocence of defendants was a nullity and the sentence imposed void, defendants could there-

after be tried when properly charged in a court having jurisdiction. State v. Hicks, 233 N.C. 511, 64 S.E.2d 871, cert. den. 342 U.S. 381, 96 L.Ed 629. It is manifest there is here no double jeopardy. Green v. United States, 355 U.S.—, 2 L. Ed. 2d 199, on which defendants rely, has no application to the facts here presented. Double jeopardy is a valid defense when established by the facts. N. C. Constitution, Art. I, sec. 17; State v. Mansfield, 207 N.C. 233, 176 S.E. 761. Where not disclosed by allegations of the bill or warrant, it is not a ground to quash.

In closing the opinion in the previous appeal, the writer, author of the opinion, said: "Defendants may, of course, now be tried under the original warrant since the court was without authority to allow the amendment changing the crime charged; or they may be tried on bills found in the Superior Court for the crime attempted to be charged by the amendment."

The last clause of that opinion is also relied on in the motion to quash. The statement, accurate as to most of the counties of the State, is inaccurate with respect to Guilford and the other counties enumerated in the provise to G.S. 7-64. The Legislature, in the exercise of its discretion, has denied to the Superior Court sitting in the counties named in the proviso to G.S. 7-64 the right to exercise concurrent jurisdiction with inferior courts in the trial of misdemeanors. Because of the limitations so imposed on the jurisdiction of the Superior Court of Guilford County, it could not exercise original jurisdiction of the crime charged, namely, trespass after being forbidden, and if defendants were to be prosecuted for the trespass presently charged, the prosecution had to originate in a court inferior to the Superior Court. This is made clear in the concurring opinion of Justice Parker, who said: "It seems plain that a verdict of conviction or acquittal on the warrants in this case as drawn would not be a bar to the new warrants in the form to which they were changed by the amendments."

[*Federal Court Judgment*]

The third and final reason assigned for quashing the warrants is the refusal of the court to take judicial notice of a judgment in a suit by defendants against the City of Greensboro, The Greensboro City Board of Education, and Gillespie Park Golf Club, Inc. (Simkins v. City of Greensboro, 149 F.Supp. 562) which adjudged the plaintiffs in that suit had been denied the privilege of using the property involved in that litigation because of their color or race. A motion to quash is a proper method of testing the sufficiency of the warrant, information, or bill of indictment to charge a criminal offense. It is not a means of testing the guilt or innocence of the defendant with respect to a crime properly charged. "The court, in ruling on the motion, is not permitted to consider extraneous evidence. Therefore, when the defect must be established by evidence *aliunde* the record, the motion must be denied." State v. Cochran, 230 N.C. 523, 53 S.E.2d 663; Richardson v. State, 4 S.W.2d 79; 27 Am.Jur. 695.

Since none of the reasons nor all combined sufficed to sustain the motion to quash, the court correctly overruled the motion and put defendants on trial for the offense with which they were charged.

[*Invasion of Property a Crime*]

To invade property in the possession of another is a crime under our laws. The severity of the punishment for such invasion is measured by the character of the entry. But the essential ingredient in the crime is possession by the person named in the warrant. If the possession is actual, the State need only establish that fact, but if the State fails to establish actual possession, it must establish a right to possession which by operation of law implies possession. State v. Clyburn, 247 N.C. 455; State v. Cooke, *supra;* State v. Baker, 231 N.C. 136, 56 S.E.2d 424.

Defendants do not controvert the fact that the corporation named in the warrant had physical possession of the property nor do they deny that over the protest of the agent of the corporation they took possession. The conduct depicted and not denied would suffice to convict defendants of a forcible trespass. G.S. 14-126. It could easily have resulted in a serious breach of the peace. The State did not, however, charge them with that offense. It charged only the less grave offense of entry after being forbidden. As a defense to that charge, it is sufficient for defendants to establish that they entered under a *bona fide* belief of a right to so enter, which belief had a reasonable foundation in fact. State v. Haggart, 170 N.C. 737, 87 S.E. 31; State v. Wells, 142 N.C. 590; State v. Fisher, 109 N.C. 817, but the burden is on the defendant to establish facts sufficient to excuse his wrongful

conduct. State v. Durham, 121 N.C. 546; State v. Wells, *supra*. There was nothing in the State's evidence showing or tending to show any right on the part of defendants to enter after having been forbidden to do so. Hence the court correctly refused to allowed defendants' motion for nonsuit.

[*Lease Offered in Evidence*]

Defendants offered in evidence a lease dated 19 April 1949 from the Board of Trustees of the Greensboro City Administrative Unit to Gillespie Park Golf Club, Inc. This lease recited that the property therein described had in 1947 been leased to the City of Greensboro so that the city might operate a golf course thereon, that Greensboro had agreed to cancel its rights under the lease, that lessor was of the opinion that it would not need the property for school purposes during the next ensuing five years and "since a nine-hole golf course has been laid out thereon, the Board of Trustees is of the opinion that it is advisable to lease the property to the Golf Club in order that its use as a golf course may be continued during the term of this lease, such use being, in the opinion of the Board of Trustees, a public or semipublic use." The lease was for a period of five years at a rental of $1000 per annum, but with a provision that lessor might cancel upon sixty days' notice if the property was needed for school purposes or if lessor desired to sell. An extension agreement was put in evidence extending lessee's term. The asserted trespass occurred during the extended term.

There is evidence that lessee had, during its term, expended more than $100,000 in enlarging the course from a nine-hole course to an eighteen-hole course, constructing a club house, and making other improvements. Defendants offered in evidence bylaws adopted by lessee. The only two which may have any pertinency to this action are sections 1 and 2 of article 1. They provide: "SECTION 1—Membership. Membership in this corporation shall be restricted to members who are approved by the Board of Directors for membership in this Club. There shall be two types of membership; one, the payment of a stipulated fee of $30.00 or more, plus tax, shall cover membership and greens fees. The other type of membership shall be $1.00, plus tax, but this type of member shall pay greens fees each time he uses the course. The greens fees and the amount of membership fees may be changed by the Board of Directors at any time upon two-thirds vote of the members of the Board. SECTION 2—Use of Golf Facilities. The golf course and its facilities shall be used only by members, their invited guests, members in good standing of other golf clubs, members of the Carolina Golf Association, pupils of the Professional and his invited guests."

[*No Authority to Operate*]

The City Administrative Unit, a governmental agency separate and distinct from the City of Greensboro, had no authority to operate recreational facilities which were not in some way related to the operation of the public school system. The Legislature created both County and City Administrative Units "for purposes of school administration." G.S. 115-4. The Administrative Unit, having acquired more land than was presently needed for school purposes, had legislative authority to lease the surplus. G.S. 115-126 (5), Cline v. Hickory, 207 N.C. 125, 176 S.E. 250; 38 Am.Jur. 169. In the exercise of its discretion it could in good faith lease for a public or a private purpose. Prior to its lease to Gillespie Park Club, it had leased the property to the City of Greensboro. The City had apparently used it for recreational purposes and had erected a golf course thereon. When that lease terminated, the school authorities leased to a private corporation, but in their lease were careful to state that lessee was taking and would use it for public or semipublic purposes, namely, the operation of a golf course. Having expressly declared that the use which the lessee would make was a public or semipublic use, the law will presume the parties intended and contemplated that the property should be used without unlawful discrimination because of race, color, religion, or other illegal classification. "It is an elementary rule of construction that parties will be presumed to have used language effectuating a lawful purpose rather than one which is unlawful." Beasley v. R.R., 145 N.C. 272; Newberry v. City of Andalusia, 57 So.2d 629. Since the operator of the golf club was charged with making a public or semipublic use of the property, it could not deny the use of the property to citizens simply because they were Negroes. This Court gave definite recognition to the principle of equality

of treatment as between whites and Negroes nearly three quarters of a century ago. Puitt v. Commissioners, 94 N.C. 709.

Dawson v. Mayor and City Council of Baltimore City, 220 F.2d 386; Lawrence v. Hancock, 76 F.Supp. 1004; Tate v. Department of Conservation and Development, 133 F.Supp. 53; Culver v. City of Warren, 83 N.E.2d 82, cited and relied upon by appellants are but applications of an established legal principle to the factual situations found to exist in each of those cases. This case in no wise questions the soundness of the legal principles there enunciated.

[*Can't Require Separation*]

Since the decision in Brown v. Board of Education, 347 U.S. 483, 98 L.Ed 873, 74 S.Ct 686, separation of the races in the use of public property cannot be required. Judge Fountain expressly charged the jury that defendants could not be discriminated against because of color. He charged: "Now as to that question which arises upon the evidence, I instruct you then, ladies and gentlemen of the jury, that under the law as determined by the United States Court and as pronounced by them, the Gillespie Golf Club, Inc., by leasing the land from the City of Greensboro to use as a golf course was subjected to the same obligations as the City of Greensboro would have been had it operated a golf course itself. It was subjected to the same rights as the City would have had, the same obligations and same responsibilities; that is to say, the law would not permit the City and, *therefore, would not permit its lessee, the Gillespie Park Golf Club, Inc., to discriminate against any citizen of Greensboro in the maintenance and operation and use of a golf course. It could not exclude either defendant because of his race or for any other reason applicable to them alone;* that is to say, they were entitled to the same rights to use the golf course as any other citizen of Greensboro would be provided they complied with the reasonable rules and regulations for the operation and maintenance and use of the golf course. They would not be required to comply with any unreasonable rules and regulations for the operation and maintenance and use of the golf course."

It will be observed that Judge Fountain, in his charge, treated the lease as though it were made by the City of Greensboro in the exercise of one of its corporate functions. In fact the lease was made by the school unit which had no duty or right to operate a golf course but which voluntarily provided for public use.

The court further charged: "If the corporation organized and known as the Gillespie Park Golf Club, Inc., if it maintained property and operated and used it for a golf course belonging to the City of Greensboro and if the defendant was a resident of the City of Greensboro, then he had the same right to become a member of the golf club as any other resident of Greensboro, if he was a member of another golf club which had a reciprocal agreement with the Gillespie Park Golf Club to permit members on one course or members of one club playing on the other course, then such defendant and each of them had the same right or had the right to play upon the Gillespie Park Course. If the defendants, or either of them, were guests of some members of the Gillespie Park Golf Club, then they had a right to play upon that course.

"In other words, ladies and gentlemen of the jury, they had the same right under the laws as interpreted by the United States Courts to play on the golf course as any other citizen of the City of Greensboro provided they compiled with the reasonable rules and regulations designed for the orderly maintenance and use of the golf course by the citizens of Greensboro."

He further charged, after stating defendants' contentions with respect to their right to play: "I instruct you, members of the jury, if a party entering upon the land has a legal right to do so, of course he may not be convicted of a trespass."

[*Defendants Motion*]

Defendants moved to set aside the verdict of guilty. As the basis for their motion they rely on Simkins v. City of Greensboro, *supra*, decided by the United States District Court in March 1957. Although defendants had the record in that case identified, they did not offer it in evidence. It is not a part of the record presented to us. Our knowledge of the facts in that case is limited to what appears in the published opinion.

Examining the opinion, it appears that ten people, six of whom are defendants in this action, sought injunctive relief on the assertion that Negroes were discriminated against and

were not permitted to play on what is probably the property involved in this case. We do not know what evidence plaintiffs produced in that action. It is, however, apparent from the opinion that much evidence was presented to Judge Hayes which was not before the Superior Court when defendants were tried. It would appear from the opinion that the entry involved in this case was one incident on which plaintiffs there relied to support their assertion of unlawful discrimination, but it is manifest from the opinion that that was not all of the evidence which Judge Hayes had. We are left in the dark as to other incidents happening prior or subsequent to the conduct here complained of, which might tend to support the assertion of unlawful discrimination. On the facts presented to him, Judge Hayes issued an order enjoining racial discrimination in the use of the golf course. Presumably that order has and is being complied with. No assertion is here made to the contrary.

To support their motion, defendants say in their brief: "That to allow the verdict to stand would amount to a collateral attack on the Federal decision." The mere assertion that a court of this State has not given due recognition to a judgment rendered by one of our Federal courts merits serious consideration.

[*State Denies Attack*]

The State challenges the assertion that there has been an attack, collateral or otherwise, on the judgment rendered by the District Court. It maintains that the questions to be answered are these: (1) Should a court take judicial knowledge of facts found at another time by another court in another action; and if this question be answered in the affirmative, (2) is the State, in a criminal prosecution, concluded by facts found in a civil action to which it is not a party?

Since defendants for reasons best known to themselves elected not to offer in evidence the record in the Federal court case, it is apparent that the first question propounded must be answered. Unless we are to depart from previous adjudications by this Court and similar decisions by the Federal courts and the courts of sister States, the answer to that question must be no.

Speaking with respect to judicial notice, Chief Justice Marshall said: "The looseness which would be introduced into judicial proceedings would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages." U.S. v. Wilson, 7 Pet. 150, 8 L.Ed. 640.

[*Not Bound To Take Notice*]

Mr. Justice Miller said: "While it is certainly true that the pendency of a suit in one court is not a defense, though it may sometimes be good in abatement, to another suit on the same cause of action in another court of concurrent jurisdiction, it may be considered as established that when a judgment is recovered against the defendant in one of those courts, if it is a full and complete judgment on the whole cause of action, it may be pleaded as a defense to the action in that court where it is pending and undecided. Neither court would be bound to take notice of the judgment in the other court judicially." Schuler v. Israel, 120 U.S. 506, 30 L.Ed 707. To like effect see State v. McMilliam, 243 N.C. 775, 92 S.E. 205; Reed v. Holden, 242 N.C. 408, 88 S.E.2d 125; Hampton v. Pulp Co., 223 N.C. 535, 27 S.E.2d 538; Daniel v. Bellamy, 91 N.C. 78; Bluthenthal v. Jones, 208 U.S. 64, 52 L.Ed 390; Williams-Perry v. Reeder, 17 N.W.2d 98; Naffah v. City Deposit Bank, 13 A.2d 63; Belyeu v. Bowman, 41 So.2d 290; James v. Unknown Trustees, Etc., 220 P.2d 831; Swak v. Department of Labor & Industries, 240 P.2d 560; Paridy v. Caterpillar Tractor Co., 48 F.2d 166; Morse v. Lewis, 54 F.2d 1027; Helms v. Holmes, 129 F.2d 263; Atlantic Fruit Co. v. Red Cross Line, 5 F.2d 218; Polzin v. National Co-op Refinery Ass'n., 266 P.2d 293; Divide Creek Irrig. Dist. v. Hollingsworth, 72 F.2d 859, 96 ALR 937, with annotations; White v. Central Dispensary & Emergency Hospital, 99 F.2d 355, 119 ALR 1002; Robinson v. Baltimore & O. R. Co., 222 U.S. 506, 56 L.Ed 288; 31 CJS 627; 20 Am.Jur. 102.

Because the judgment in the case of Simkins v. Greensboro was not in evidence, the court had no knowledge in a legal sense of any facts there determined, and could make no pronouncement of law with respect to facts which were not in evidence. Judge Hayes' published opinion was available. That opinion is a declaration of the law on the facts which Judge Hayes found.

Since the court was not required to take judicial notice of the judgment in the civil action, we are not called upon to determine the effect which should have been given if offered in evidence.

[*Role of Collateral Estoppel*]

When the doctrine of collateral estoppel should be applied is not always easily solved. In Van Schuyver v. State, 8 P.2d 688, it was held that a judgment in a civil action between prosecuting witness and defendant which determined the ownership of domestic fowl could not be used by the defendant in a criminal action to estop the State from prosecuting him on a charge of larceny. Similar conclusions have been reached in other jurisdictions with respect to the ownership of property. State v. Hogard, 12 Minn. 293; People v. Leland, 25 N.Y.S. 943; Hill v. State, 3 S.W. 764 (Texas).

It is said in the annotation to Mitchell v. State, 103 Am.St.Rep. 17: "When the previous judgment arose in a case in which the state or commonwealth was the prosecutor or plaintiff and the defendant in the case at bar was also the defendant, and the judgment was with reference to a subject which is material to the case at bar, the doctrine of res judicata applies. (citations) But where the judgment to which it is sought to apply the doctrine of res judicata was rendered in a civil proceeding to which the state was not a party, or in a criminal proceeding to which the defendant in the case at bar was not a party, the doctrine of res judicata does not apply. (citations)"

The Supreme Court of the United States has recognized and applied the law as there announced to differing factual situations. Compare U.S. v. Baltimore & O. R. Co., 229 U.S. 244, 57 L.Ed 1169, and Williams v. N.C., 325 U.S. 226, 89 L.Ed 1577. Other illustrations may be found in: State v. Dula, 204 N.C. 535, 168 S.E. 836; Warren v. Ins. Co., 215 N.C. 402, 2 S.E.2d 17; Powers v. Davenport, 101 N.C. 286; State v. Boland, 41 N.W.2d 727; People v. McKenna, 255 P.2d 452; State v. Morrow, 75 P.2d 737; State v. Cornwell, 91 A.2d 456; State v. Greenberg, 109 A.2d 669. Extensive annotations appear as a note to Green v. State, 87 ALR 1251; 30 Am.Jur. 518. Defendants were not, as a matter of right, entitled to have the verdict set aside.

The exceptions to the admission and exclusion of evidence have been examined. We have found none which indicates prejudicial error or appears to warrant discussion.

We find

No error.

GOVERNMENTAL FACILITIES
Housing—California

Oliver A. MING v. Milton G. HORGAN, et al.

Superior Court, County of Sacramento, California, June 23, 1958, No. 97130.

SUMMARY: A Negro brought an action seeking declaratory relief against defendants for the alleged refusal to sell real estate solely on the basis of his race. Defendants were real estate agents and builders of housing being sold under mortgage insurance granted by the Federal Housing Administration and the Veterans Administration. The court found that together with state licensing of defendants, federal mortgage guaranties, building inspection and advertising amounted to governmental action so as to bring the alleged deprivation of rights within the prohibition of the Fifth and Fourteenth Amendments. Plaintiff was granted declaratory relief and nominal damages.

OAKLEY, Superior Judge.

This is the case of a Negro who claims to have been excluded from eligibility to purchase a new tract home in one after another of F.H.A. and G. I. insured subdivisions in the Sacramento

area; and that such exclusion was at the hands of various defendants and was based solely upon his race and color, despite his financial and other qualifications.

The following facts were proven and serve to differentiate this case from other decisions in which the issue of racial discrimination has been in issue. Plaintiff, a member of the Negro race, was refused consideration of his application for a tract home through the instrumentality of real estate sales agents who were engaged by a builder-subdivider to sell homes he constructed after the latter had obtained both F.H.A. and G.I. "commitment" for the houses in that particular tract. Plaintiff was similarly refused in other instances. Since nine other members of the same race had similar experiences, plaintiff's was not an isolated experience or the result of mistake or personal antipathy, and while the locations of the various houses varied a good deal, and the sales persons, builders and owners encountered were usually different people than plaintiff tried to deal with, and in many instances were not among the defendants in this case, the overall pattern was the same and the result achieved in each instance was a refusal to acknowledge eligibility of the Negro applicant solely on the basis of race. The result has not been to deny colored people housing in the Sacramento area; indeed, it has been shown possible for such people to acquire the same or similar property on second sales or by other devious means, but it has resulted that Negroes have been and are turned away from original sales of most tract homes in the area despite an increase in the percentage of Negro population in the last few years and an increase in their rate of income as compared with members of the white race. The inference that is bound to be drawn from this is that there is no economic or financial reason to deny eligibility to colored people as such and there is every reason to believe that housing for them of the nature referred to is, and was, in demand.

[*Established Law*]

It seems to be the established law of this state that an individual who is a member of a minority race may not be denied equal rights by direct action of the state or one of its subordinate agencies. Banks v. S. F. Housing Authority, 120 Cal.App.2d 1. It was there held that such action would be violative of the 14th Amendment. It is also settled that denial to a member of a minority race of a job or privileges incident thereto through the means of a private organization (labor union), membership in which was a condition of eligibility to such job, is violative of the same constitutional guaranty. James v. Marinship Corp., 25 Cal.2d 721; Williams v. International Brotherhood of Boiler Makers, 27 Cal.2d 586; Steele v. Louisville and Nashville R. R. Co., 323 U.S. 192.[1] In the field of real property law it has been held that a private individual will not be permitted to secure through state courts the enforcement of restrictive racial covenants. Shelley v. Kraemer, 334 U.S. 1. On the other hand it has also been held that it is no violation of law for such an individual to be denied personal service by a state licensed professional man—in that case, a dentist. Coleman v. Middlestaff, 147 Cal.App.2d Supp. 833.[2]

[*Two Types of Business*]

On the subject of governmental action by or through the agency of the state, it is to be noted

1. In the James case, at Page 739, the Court noted that the 5th, 14th and 15th Amendments to the U. S. Constitution have long prevented governmental action discriminating against persons on account of race or color, and noted that the U. S. Supreme Court had recently held that these provisions prevent a political party from denying Negroes the right to vote in a primary election where under state law that party is acting as an agency of the state in conducting elections, citing Smith v. Allwright, 321 U. S. 649.

   In the James case a labor union had obtained a monopoly of the labor supply through closed shop agreements, and the Court likened the union to a public service business which may not unreasonably discriminate (25 Cal.2d 740). In such case no statute was necessary to implement the exercise of the right.

   In the Williams case, referring to Railway Mail Assn. v. Corsi, 326 U.S. 88, it was held that an organization functioning "under the protection of the State" and which holds itself out to represent the general business needs of employees thereby sacrifices any power it otherwise might have to indulge in racial discrimination. (27 Cal.2d 590) This case also makes it plain that failure to allege or prove a labor monopoly is not fatal to plaintiff's case so long as it is shown that the activity does not have a proper purpose and constitutes an unlawful interference with a worker's right to employment.
2. State licensing in that case was not mentioned in the opinion; the action was one for damages under Civil Code 51 and 52 on the theory that a dentist's office is like an inn, restaurant, hotel, eating-house, place where ice cream or soft drinks are sold for consumption on the premises, barber shop, bath house, theater, skating rink, public conveyance, and "all other places of public accommodation or amusement."

in the present case that we are concerned with persons engaged in two distinct lines of private business who are accused of conspiring to prevent Negroes from buying tract homes. These two lines of business are (1) Land subdividers and builders of homes who are required to obtain state approval of their subdivisions and who also need contractor's licenses issued by the state in order to build, and (2) Real estate brokers and salesmen who must obtain state licenses to engage in their respective activities. Considered alone, we see no "exertions of state power" (Shelley v. Kraemer, supra) in this aspect of the case any more than in the case of the Los Angeles dentist (Coleman v. Middlestaff), and not even raised in that case.

But the invocation of federal assistance by such licensees through F.H.A. is another matter. That is, the utilization of federal administrative process, the gaining of federal assistance in attracting buyers by advertising F.H.A. and V.A. financing, the federal approval of plans, layouts, utility services, construction standards, and ultimately mortgage guaranties of loans upon federal assurance that adequate standards have been met, places an aspect on the case that requires further examination to determine whether the necessary legislative intent included the equal treatment of all citizens who can establish their financial qualifications.

[*Adequate Housing Is Goal*]

The federal legislation has for its primary objective the making of adequate housing more readily available to all citizens who can meet minimum requirements of financial responsibility. In order to do this it offers to guarantee the citizen's loan. It does not itself finance the loan —it merely guarantees the private loaning agency against loss.[3] To make this feature attractive to buyers, it imposes certain conditions upon those who furnish the housing; that is, in addition to requiring buyers to themselves qualify, it exacts certain standards of construction. It can be assured of those standards only by a system of inspecting, viewing and testing. Consequently, when a new tract is planned, at the invitation of the subdivider, the federal agency undertakes to pass upon the subdivision as a whole in order to be assured of adequate waste disposal, access, spacing for light and air, water supply and other utilities, and the several other facilities that determine living desirability and comfort. The individual housing plans are also submitted to the federal agency and are considered by it and definite construction standards must be met. In advance of the work being done, F.H.A. will, after considering and approving the plans, issue a commitment which gives the subdivider and the builder assurance he or they can safely proceed, knowing that faithful execution of the plans will qualify the structures they have built for F.H.A. insurance. As construction progresses, F.H.A. inspectors follow a fixed pattern of checking from time to time to give added assurance the structure as built conforms to standards it has set.

[*Cannot Play Favorites*]

It is the Federal government that has established this system, in order to answer housing needs. That government is strictly prohibited by the fundamental law from doing such things upon any other than an equal basis—i.e., it cannot play favorites as to race, color or creed, it cannot confer these benefits upon one racial group and not another; it must do them if at all for all citizens who can qualify on a reasonable basis of economic or financial standing, which means to demonstrate to administrative satisfaction the ability to pay off the loan.

Indirectly and secondarily, but not unimportantly, the beneficiaries are (1) the lender who gets a Federal guaranty of his loan, (2) the real estate man, the builder and the subdivider, who have been provided a ready means by which they can market their respective products. Each of the latter group can count on his market, rather than simply invest his time, labor and money in developing property and then hope for buyers who can persuade a lender to advance enough to enable them to purchase with no security other than the property itself.

There is no need to dwell on the history of housing since this system was established. It is common knowledge that institution of government mortgage insurance has liberalized lending practices to such an extent that home building and home ownership has boomed far beyond previous experience; all to the benefit not only of the general public that has thus had new housing made available to it, but to the sub-

3. We here ignore any provision of the act that may provide insurance of builders' construction loans, since it is not clear from the evidence that such loans were a factor of any consequence in the Sacramento area.

stantial advantage also of all associated with it, including builders, subdividers and realtors.

[*Choice of Customer*]

Defendants contend they have, as private owners, builders and dealers in real estate, a perfect right to sell to whomever they choose, that they are at liberty to decline to sell to any person they choose, that this is a fundamental right enjoyed by all citizens protected by constitutional guaranty; in short, that their right of freedom of contract characteristic of any business or individual is at stake. They observe that as business men and individuals, government will not and cannot tell them either that they must select certain persons or classes of persons to contract with or that they cannot deal with certain people. This is the way they have operated their businesses for years, recognizing an obligation as enlightened business men, nevertheless, to do everything they can to please their customers, construct and sell satisfactory homes to people who can live comfortably therein with all modern conveniences within their means. The real estate industry in general seems to have accepted, among other things, a responsibility incident to their selling not to be instrumental in bringing into any given neighborhood any inharmonious element that would create friction or unpleasantness therein. Thus, they have in a decent and considerate way attempted to dissuade any prospective purchaser whose race or color might offend neighbors, especially where those neighbors had been customers of the same real estate firm. Much of plaintiff's evidence was to show how various defendants, their agents and others accomplished this—by avoiding talking to Negro inquirers; if that failed, by seeking to disqualify such inquirer on financial grounds; if that also failed, by denying authority to accept a deposit and referring the inquirer to the main office; or if no other excuse was handy, by explaining that the owner had forbidden his sales agent to sell to Negroes. There was testimony (denied by the realtor concerned) that one realtor declined positively to refuse to sell to Negroes, and instructed his salesmen to accept any deposit offered and place it in the office safe and then sit tight until the prospect got discouraged. (Trans. p. 584, lines 12-19) A variety of other means were resorted to in individual instances, where it became necessary, to wear down the Negro applicant.

It is noteworthy that everyone along the line, owner, subdivider, builder and realtor consistently denied (and this court has no doubt of the truthfulness of their statements) any personal desire to reject or disappoint any Negro home-seeker. They sought to pass the responsibility for declining to sell to the other fellow. Thus, one subdivider and builder felt the matter of Negro applicants was not his business, that it was the affair of the agent he employed to sell the houses; and that agent would make the excuse that he couldn't deal with the applicant because the owner-subdivider-builder refused to deal with Negroes.[4]

[*Collision of Rights*]

Thus, we are faced with a situation where plaintiff's right not to be discriminated against in acquiring housing collides with defendants' right to contract with whomever they choose. There is, of course, no legal restriction whatever against an individual discriminating on the basis of color, race, creed or any other characteristic, in exercise of his freedom to contract. Whatever legal restriction exists is a restriction on govern-

4. Plaintiff testified a Mr. Fry made that latter representation to him and said he would refer plaintiff's application to the subdivider's office in Oakland and let plaintiff know when plaintiff called again, and though plaintiff never heard from this referral he was later told by another sales representative at the same location that they were not selling to Negroes and that that was final. (Trans. pp. 23-26)

Defendant Fry's account of this incident, with some minor variations (such as an effort to convince plaintiff he would not be happy there since there were no other Negro families in the area, [Deposition of Fry, p. 10, lines 15-18]) substantiates plaintiff's account that he referred the matter to the owner who in any event had to accept the application before it was binding, and his instructions were to refer such matters to the owner. (Deposition of Fry, pp. 8-16) And Fry is corroborated as to his instructions by defendant Horgan's testimony (Horgan being Fry's superior and the broker who had a contract to sell Heraty & Gannon's tract houses) that it was the policy not to sell to Negroes, that if any Negro applied the matter should be discussed with him in a diplomatic way so as not to antagonize anyone. (Deposition of Horgan, pp. 6-7)

Defendant Gannon, the builder of McClellan Meadows housing with F.H.A. and G.I. commitment (Transcript p. 321) and who hired Horgan as broker to sell, said the matter of selling to Negroes was a problem he had heard discussed, but he felt it was the problem of the sales agent, that the latter would not want to hurt the subdivision and could pick his own customers, and when a salesman would take the matter up with him "I'd brush it off." (Transcript pp. 330-1 and 332-9) And he denied he ever set a policy of not selling to Negroes. (p. 337, line 19; p. 338, line 9)

ment.[5] Here we have a situation where government, accompanied by constitutional restrictions against discrimination, has entered the field of housing to stimulate its construction and make more and better housing available to its citizens. To do this, the way is eased for all concerned—for subdividers, builders and realtors, as well as lending agencies and the home-buyer. True, no appropriation of money, no subsidy, is given to any of these. The powers of government are merely exercised by way of mortgage insurance guaranty, inspection services and the various other administrative accompaniments incident to establishment of the system. In Plaintiff's view, the respective participants in the program are bound to adhere to the restrictions and limitations of the government in view of their voluntary acceptance of the advantages they have been provided — such advantages being numerous in detail but being generally embraced in the idea that they have been provided with a customer list and they have been enabled to build wholesale for the masses, rather than for individual customers. While it was undoubtedly an overstatement (No funds as such being involved) plaintiff's characterization of his theory at one point is expressive—that when one dips one's hand into the Federal Treasury, a little democracy necessarily clings to whatever is withdrawn. His position is that in effect the government has made builders and realtors its agents for the purpose of providing housing to the general public.

On the other hand, defendant's conception is that those who are engaged in subdividing and developing tracts of land, building homes in such subdivisions, and selling such homes are engaged exclusively in a private business enterprise, unfettered by and unbeholden to government. Their activities are unrelated to and not dependent on government or its functioning any more than any other business pursuit, and one of the outstanding characteristics of private business enterprise in this country is freedom of contract—a time-honored right that finds expression in and is protected by the fundamental law. The law-making power has properly done what it could in the interests of its citizenry to stimulate business, to relieve housing shortages and to make available to qualified purchasers adequate housing facilities. The way was open to Congress if it felt it necessary or appropriate to place limitations and restrictions of any kind upon those who took advantage of the benefits of the legislation; but it intentionally and deliberately declined to restrict owners, builders, lending agencies or any one else as to their freedom in choosing their customers—i.e., it declined to require such persons to refrain from discrimination. In fact, being thoroughly aware of conditions throughout the country, and knowing full well that such discrimination had been the rule of practice always, Congress consciously rejected all effort to forbid such discrimination, in spite of strenuous efforts to attach such provision to the law. All that was done by government in this respect was the adoption of an administrative regulation the effect of which was to forbid the insertion of any restrictive racial covenant in any instrument conveying title. Under these circumstances, it is reasoned, it does no good to dwell on the restrictions against racial discrimination that characterizes governmental action; admittedly Congress could not enact a law which benefited only members of one race, but this is not such a law. (If the "separate but equal" rule were still the law and applicable to real estate transactions, their argument might be strengthened by pointing out that there is nothing in the housing laws to prevent the developing of subdivisions exclusively for colored occupancy. Throughout the record in this case there are references to at least one such subdivision in the Sacramento area—Glen Elder.) Thus, given every opportunity to compel adherence to non-discriminatory practices, the law-making power expressly refrained therefrom and in effect decreed the continuance of selective practices that it well understood had been theretofore adhered to and which was strictly in accord with the right of every business man to do business with persons of his own selection.

[*Effect of Constitution*]

In opposition to this argument plaintiff vigorously maintains that the restrictions placed by

5. Corrigan v. Buckley, 299 Fed. 899, 901 (appeal dismissed 271 U. S. 323) states: "The constitutional right of a Negro to acquire, own and occupy property does not carry with it the constitutional power to compel sale and conveyance to him of any particular private property. The individual citizen, whether he be black or white, may refuse to sell or lease his property to any particular individual or class of individuals. The state alone possesses the power to compel a sale or taking of private property, and that only for a public use." Although this statement was made in 1924, no reason occurs to believe it is not valid today.

the fundamental law upon Congress necessarily thereby inhere in its every act; that it means nothing that there is no express inhibition against racial discrimination in the law as written; that it is nevertheless there merely because it is an act of Congress; that the latter cannot enact a law which sanctions or tolerates such discrimination; that it cannot enact a law for the benefit of any single race to the exclusion of others, any more than it could enact a law benefiting only one religious sect; that all who seek the benefits of this law are bound by the same rule and are not at liberty to themselves discriminate in its operation, for to so permit would be to make a mockery of the constitutional inhibition. His proof in this case tends strongly to show that exclusion of Negroes from eligibility has actually been accomplished in numerous individual instances—not by any governmental action as such—but by individual builders and realtors, acting as individuals in the exercise of their asserted freedom of contract, and not purporting to exercise governmental functions, but at the same time having gained the stamp of governmental approval of their product with relation to a market greatly stimulated by governmental assistance, and in that sense under the aegis of sovereign power.

It is to be kept in mind that since the virtual abandonment by our highest court of the "separate but equal" test, there has been even further development along anti-racial lines. Not only has it been decreed that equal, though separate, facilities and accommodations are not in the spirit of and do not conform to the purpose of the Constitution, but the "separateness" itself is denounced as without authorization. In other words, to meet the constitutional test, "integration" must be provided and segregation on a racial basis will not be permitted. True, a private individual, consistent with his inalienable right, is free to select his customers on any basis he may choose, and he may place in any deed he executes any racial restriction he desires. But if he seeks the aid of government to enforce the latter restriction, he will find that the courts will refuse his plea. (Shelley v. Kraemer, 334 U.S. 1). For to do so would constiute sovereign compliance with a concept at odds with basic rules that guide official action.

The United States Supreme Court four years ago announced the principle that segregation of the races in public education is "not reasonably related to any governmental objective," and such segregation in the District of Columbia imposes on Negro children "a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause." Bolling v. Sharpe, 347 U.S. 497, 500. On the same day, in other cases arising in Kansas, South Carolina, Virginia and Delaware (Brown v. Bd. of Education, Briggs v. Elliott, Davis v. County School Bd., and Gebhart v. Belton, 347 U.S. 483), the equal protection clause of the 14th Amendment was held to achieve the same result in state schools, regardless of the provision of equal facilities, curricula, teachers, etc.

[*Universal Practice*]

That being so, what are courts to say of the practice, universally followed in selling homes, of excluding a racial minority? Obviously, if defendants were here seeking relief on the basis of their selection of customers on the basis of race, they would not be assisted. However, they are not here asking any such relief; all they ask is to be let alone to enjoy the fruits of their enterprise as assisted and stimulated by government. Can the courts close their eyes to the inevitable result that if they should uphold defendants in their asserted right of freedom of contract, they would for practical purposes be reverting to a "separate but equal" rule for those to whom the builders and realtors choose to apply it? Negroes could still get housing—they might persuade someone else to buy and remain as undisclosed principal (at least one of the witnesses in our case seems to have done this—by means of "subterfuge" he said [Transcript, pp. 627-8]); or they could buy from original purchasers in tracts who might be willing to sell to them; or they might be able to develop tracts expressly for members of their race (this latter being strictly a separate but equal concept). But gone would be the principle of integration which seems to have become the law of the land as a necessary component of that equality of right required by the Constitution. If that principle is to be the guiding rule in so personal a relationship as marriage (Perez v. Sharp, 32 Cal.2d 711), as well as education and recreational facilities, and if it is to be applied in public housing (Banks v. Housing Authority, 120 Cal.App.2d 1; cert. denied by U. S. Supreme Court, 347 U.S. 974), there would seem to be no basis for denying its applicability to the ac-

qusition of real property. If it be objected that Congress refused to so ordain, it must be replied that Congress could not ordain otherwise—the law does not permit it to differentiate between races, and whether it expresses that limitation in so many words or not, those who operate under that law and seek and gain the advantage it confers are as much bound thereby as the administrative agencies of government which have functions to perform in connection therewith. Congress must have intended the supplying of housing for all citizens, not just Caucasians—and on an equal, not a segregated basis. If the courts were to hold otherwise and accord to builders and realtors the unfettered freedom of contract here contended for, the constitutional guaranties of equal protection and non-discrimination would be accorded only secondary importance and they would have to recede from a good deal that has been laid down in recent years as fundamental doctrine. Even though it may be thought our highest courts can and would do that, this court is not at liberty to do so, but is bound to follow the principles and interpretations announced by those courts as correct expositions of the law.

[*Denial of Conspiracy*]

Throughout the trial and in their brief, defendants objected to evidence relating to any transaction other than plaintiff's, denying there was any conspiracy directed against plaintiff individually or Negroes in general, and further denying that this is a class action in the proper sense such as might justify admission of such evidence. For technical reasons set forth in the cases [6] it appears this case is not accurately speaking a class suit. Nevertheless, the evidence of others than plaintiff as to their experiences in being refused consideration for tract home purchases is regarded as illustrative only (1) to negative any idea that refusal of plaintiff was only an isolated instance that might have been based on some consideration personal to him or his manner or his actions apart from his race; (2) that evidence was admissible as tending to show that had plaintiff applied to purchase in like subdivisions elsewhere than those he actually contacted, the result would have been the same. The Court accepts, in other words, plaintiff's theory (and it does not seem to be seriously disputed) that regardless of whether it was plaintiff or some other Negro that sought to file an application for purchase, and regardless of whether it was one or another of the defendants approached, or even if it was someone not a defendant, the privilege of being considered for purchasing would have been denied because of color; that this was the invariable practice and was justified by the defendant concerned on the basis that to sell to a Negro would be the introduction into a white neighborhood of an inharmonious element not consistent with the obligation the defendant had to others to whom he had sold or hoped to sell, and would be detrimental to the property values in the subdivision. The Court further regards as established that there was no animus in this respect on the part of any of the defendants—it was simply that good business and consideration for other customers, and a proper sense of responsibility to the community, motivated defendants to continue the practice which had always been adhered to, and which they felt was the right and considerate thing to do. That was the rule that the National Association of Real Estate Boards had, prior to recent pronouncements of the courts, included in their Code of Ethics.

[*No Intentional Injury*]

Plaintiff has characterized defendants' conduct in this respect as a conspiracy to deprive plaintiff in particular, and members of the colored race generally, of the right to acquire tract homes. Because of the factors just mentioned, however, it is believed defendants' conduct cannot be labeled a conspiracy. That term imports the doing of an intentional or an unlawful injury, and has an evil connotation. It would be wholly unjust to so stigmatize a group of substantial business men who attempted to handle a delicate situation without offense to anyone. There was no conspiratorial agreement here, there was no exchange of ideas calculated to injure anyone. It was in essence a set of individual and unrelated efforts to maintain the status quo as far as disposition of new tract homes was concerned. There was concert of action only in that each defendant had the same ideas he always had been taught, and if they were mistaken

6. Defendants' brief sets them forth at some length. Some of the pertinent California cases being Weaver v. Pasadena Tournament of Roses, 32 Cal.2d 833; Noroian v. Bennett, 179 Cal. 806; Barber v. California Employment Stabilization Commission, 130 Cal.App.2d 7; and Kennedy v. Domerque, 137 Cal. App.2d Supp. 849.

it was because concepts had changed and the courts themselves had previously been mistaken as to what the law was. How can a court, under such circumstances, brand defendants' actions a conspiracy?

The gist of this action in any event is not conspiracy. The law of California knows no such actionable civil wrong. Conspiracy in our law in civil cases, properly speaking, merely denotes a method of proof and affects only the admissibility of evidence. (The authorities are collected in 11 Cal.Jur.2d, pages 272-279.) In any given case, evidence of uniform action, without proof of a specific understanding or arrangement on the part of participants, either to use certain methods or to gain certain ends, may, under appropriate circumstances, justify the inference that there was an agreement upon concerted action. In this case, however, for the reasons stated, such an inference is not justified. The most that can be said is that there was unconsciously uniform action on the part of the defendants which had the effect of depriving Negroes of housing opportunities. It is believed the evidence of efforts to purchase by others than plaintiff was admissible on grounds already noted and no reason appears to find that a conspiracy existed.

[*Rights Violated*]

From the foregoing it is apparent that the proof established a violation of plaintiff's rights. However, evidence of his damages is both meager and equivocal. The only evidence along this line is plaintiff's testimony that he has rented housing for an average of $80.00 per month since being turned down for tract homes, but this is wholly insufficient to permit the fixing of a precise amount as damages. Under the circumstances he can be awarded nominal damages only of $1.00. Judgment for plaintiff on his cause of action for declaratory relief also appears appropriate in the circumstances. The Clerk is being directed to make an order to that effect. Plaintiff's counsel is requested to prepare and serve findings and a form of decree.

Dated: June 23, 1958.

GOVERNMENTAL FACILITIES
Public Housing—Georgia

Queen COHEN v. PUBLIC HOUSING ADMINISTRATION et al.

United States Court of Appeals, 5th Circuit, June 30, 1958, No. 16866.

SUMMARY: Negro citizens of Savannah, Georgia, brought a class action in federal district court against the Public Housing Administration and the Savannah Housing Authority and its officers. The complaint sought a declaratory judgment and an injunction to require the admission of the plaintiffs to a public housing project restricted to white persons, as well as money damages. Having granted a motion for summary judgment by the Public Housing Administration, the district court dismissed the action as to the Savannah Housing Authority, holding that the separate-but-equal public housing facilities for Negroes furnished the plaintiffs by the Housing Authority fulfilled their constitutional rights. 135 F.Supp. 217, 1 Race Rel. L. Rep. 347 (S.D. Ga. 1955). On appeal the United States Court of Appeals for the Fifth Circuit reversed in part and remanded. The court held that, as to the Public Housing Administration, substantial issues were raised by the plaintiffs which were not determined by the action on the motion for summary judgment and that plaintiffs were entitled to a trial on the question of the involvement of that agency in racial discrimination. As to the Savannah Housing Authority, the court held that the complaint stated a valid claim under the federal civil rights acts and should not have been dismissed without a trial on the merits. 238 F.2d 689, 2 Race Rel. L. Rep. 107 (1956). A trial was then had on the merits in the district court. At the opening of the trial the action was voluntarily dismissed as to all but one of the plaintiffs. The court found that the remaining plaintiff had not applied for admission to the housing project, that she was not entitled to preferential admission and that

there was no proof that the defendants had refused her any preferential right to admission. The action was dismissed as to the remaining plaintiff also. 154 F.Supp. 589, 2 Race Rel. L. Rep. 1122 (S.D. Ga. 1957). On appeal the United States Court of Appeals for the Fifth Circuit affirmed the dismissal holding that in the absence of any attempt to apply for admission to the housing project, the appellant had no standing to maintain the action.

Before RIVES, BROWN and WISDOM, Circuit Judges.

RIVES, Circuit Judge:

The complaint was originally brought by eighteen Negro residents of Savannah, Georgia for an injunction, declaratory judgment and money damages on account of racial segregation in public housing in that City, allegedly enforced by the Public Housing Administration (hereinafter called P.H.A.) and the Housing Authority of Savannah (hereinafter called S.H.A.). Earlier orders of the district court dismissing the action [1] were affirmed in part and reversed in part and remanded.[2]

After remand, but prior to the commencement of trial, seventeen parties plaintiff voluntarily withdrew,[3] leaving the appellant, Queen Cohen, as the sole plaintiff. At the conclusion of the trial, the district court found as a fact, inter alia, that "Queen Cohen never made an application for admission in the Fred Wessels Homes or any other public housing project in Savannah."

[*First Specification of Error*]

The appellant's first specification of error is that:

> "The trial court erred in dismissing appellant's suit, after a full trial on the merits, on the ground that appellant failed to prove that she had ever made application for admission to Fred Wessels Homes."

The complaint alleged that: "Each of the plaintiffs has been denied admission to Fred Wessels Homes solely because of race and color." In their answer, the defendants denied "that these defendants have determined upon and presently enforce an administrative policy of racial segregation in public housing in the City of Savannah, Georgia," and denied the allegation that "Each of the plaintiffs has been denied admission to Fred Wessels Homes solely because of race or color." The evidence showed that P.H.A. was operating under its regulation quoted in full in our former opinion,[4] which requires that:

> "Programs for the development of low-rent housing, in order to be eligible for PHA assistance, must reflect equitable provisions for eligible families of all races determined on the approximate volume of their respective needs for such housing." (PHA Housing Manual, Section 102.1)

Its policies and practices were more fully described in the testimony of Mr. Silverman, its Assistant Commissioner for Management, quoted in the margin.[5]

1. Heyward v. Public Housing Administration, S.D. Ga. 1955, 135 F.Supp. 217.
2. Heyward v. Public Housing Administration, 5th Cir. 1956, 238 F.2d. 689.
3. Mr. Stillwell, Secretary and Executive Director of S.H.A., testified upon the trial that none of those seventeen had ever applied for admission to Fred Wessels Homes; that fifteen of them had applied for and been admitted to another project, Fellwood Homes; and that two had never applied for any kind of housing.
4. Heyward v. Public Housing Administration, 5th Cir. 1956, 238 F.2d. 689, at p. 697.
5. "Q. Now, what are the policies and practices of the Public Housing Administration with respect to racial occupancy of low-rent housing projects?
"A. It is the policy of the Public Housing Administration to assure that equitable treatment is afforded to all eligible families in a locality, and that all eligible families who are admitted to housing projects by housing authorities are treated equally with respect to income limits or rents to be charged and other conditions of occupanys (sic).
"Q. What is the policy and position of the Public Housing Administration with respect to low-rent housing projects in Savannah or elsewhere as to whether or not they are operated by the Local Authority on a segregated or non-segregated basis?
"A. We have not required Housing Authorities to either segregate or non-segregate in housing projects. We have required that the housing program in every locality be available to all segments of the eligible low income families in that locality. We have not prescribed the precise fashion in which the Housing Authority shall extend that equality of treatment to the residents of the locality.
"Q. Is that policy based on your interpretation of the requirements and policies of the Housing Act itself?
"A. Yes. It is based upon our construction of the

The Housing Authority of Savannah operated, or had under construction, 2170 dwelling units of which 1120 were designated for negro occupancy and 1050 for white. The project known as Fred Wessels Homes was intended for white occupancy, but Mr. Stillwell, the Secretary and Executive Director of S.H.A., denied in his testimony that negroes had ever been refused admission to that project.[6] At the same time, Mr. Stillwell candidly admitted that his hope for success of a program of public housing for people unable to pay the cost of decent and adequate private housing lay in the maintenance of actual segregation.[7]

[*No Claim of Application*]

The appellant did not claim that she had filed any written application. Her testimony was that she went to make her application "around 1952, during the time I had to move," that the building of the Fred Wessels Homes had then been completed, but "It was empty and I didn't know who was going to take it, white or colored, and so I went to apply for one." She testified that she went to the office of the Fred Wessels

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United States Housing Act and particularly the 1949 Housing Act Amendment. The very act which created the preferences that have been discussed here, the preferences extended to displaced families, when it was being considered in the Congress, in the Senate, a motion was made to attach a non-segregated requirement to the statute. That was defeated. It is our view that that action was Congressional recognition of the fact that local practices vary in the United States, and that some Local Authorities did maintain separate projects by race and other integrated, but the failure to enact a specific congressional prohibition against it was recognition that a variety of practices might prevail.

"Q. With respect to the low-rent housing program throughout the country, that is, those projects to which PHA gives financial assistance to what extent has there been integrated occupancy as to those projects?

"A. As of December 31st, last, which is the last statistical tabulation we have, on 445 projects, approximately, containing some 163,000 dwelling units, representing about 43 percent of the entire program, were operated on an integrated basis.

"Q. Would there be any objection on the part of the Public Housing Administration if the Savannah Housing Authority, or any other Local Authority, were to determine to operate a low-rent housing project on integrated basis?

"A. None whatsover."

On cross-examination, Mr. Silverman testified:

"Q. Now, I believe you stated that your Agency interpreted the defeat of the anti-discrimination with respect to the Public Housing bill as an authorization from Congress that you and your Agency might approve segregation or integration in any particular Local Authority, or any particular locality that a Housing Authority might want to practice in public housing. Is that right?

"A. Mrs. Motley, I don't mean to quibble with you, but we didn't recognize it as that kind of an authorization. We recognized it as Congressional recognition of the fact that practices varied among the various localities in the country with respect to the low-rent housing."

6. "Q. Well, were you taking applications from negroes for the Fred Wessels Homes at anytime?

"A. For occupancy in there?

"Q. Yes.

"A. No. I have never been asked to do so. We have never had an application from a negro for occupancy in any white project and by the same token we have never had an application from a white man to go into a negro project. We have never had that to come up.

"Q. If a negro applied for admission to the Fred Wessels Homes would you put him in there? Is that what you are saying?

"A. No. He would be given consideration, but I don't know what I would do.

"Q. You wouldn't put him in there, would you?

"A. I don't know what I would do. I have never had the question to come up.

"Q. You know that this case is concerning your refusal to admit negroes to the Fred Wessels Homes?

"A. Yes, but we have never refused to take them in there."

7. "A. Well, as you know, our white projects are predominantly (sic) occupied by what is generally known as 'Georgia Crackers,' and you know that he would never consent to occupy a home adjacent to or mixed up with the colored families. Consequently, it would mean that the white projects would eventually be overwhelmingly negro, if not a 100 percent negro, and the average income of the negro is less than the average income of the white population of that same caliber, and consequently the average rent per unit would be much less and it is a question in my mind whether the rents would maintain the property and pay off its debts.

"Q. In other words, do I understand you to say that if colored people were allowed to come into the white units the white people would move out?

"A. That's right.

"Q. And there would not be sufficient eligible colored people to occupy the units sufficient to pay the amount due on the debt of that particular property. Is that right?

"A. Yes, and when I say that I mean sufficient eligible of the higher groups of rents. We have to have a certain percentage of tenants who pay a minimum rent of $15.00 and graduate on up so as to average down to enough to meet the expenses plus the subsistive to retire the principal and interest on the notes and bonds as they mature, and with this lessened income I question whether there would be enough to meet all the obligations.

"Q. And there could be a default, in your payments?

"A. Yes, that's right, the bonds, and another thing it would break down the racial equity.

"Q. Explain what you mean by breaking down the racial equity?

"A. Well, that's the point that Miss Motley has been trying to bring out, that if it was turned into all

Project.[8] Mr. Stillwell, the Secretary and Executive Director of S.H.A., and Millard Williams, and employee of S.H.A. from 1951 to 1955, were brought into the courtroom for purposes of identification. The appellant was unable to identify either of them as the one with whom she had talked.[9]

Appellant testified that her cousin, Susie Parker, had accompanied her when she went to make her application. When Susie Parker came to testify, she positively identified Millard Williams as the one with whom the conversation took place.

In rebuttal, both Stillwell and Williams denied having had any such conversation, or ever having seen the appellant or her cousin prior to the trial. Mr. Stillwell testified further that the Fred Wessels Homes had not even been built in 1952, that there were then no buildings on the site.

[*Deny Application*]

Stillwell and Williams denied that there had been any application or attempt to apply for admission to Fred Wessels Homes specifically on the part of any one of the eighteen original plaintiffs, and generally on the part of any other negro. None of the seventeen other original plaintiffs testified in rebuttal, nor was any reason given for their failure to testify.

The district court had the advantage of seeing and hearing the witnesses, while this Court may only read their testimony. Upon the present record, it is an understatement to say that the pertinent fact-finding by the district court does not appear to be clearly erroneous Rule 52(a), Federal Rules of Civil Procedure.

That, however, is not the end of this case, for appellant next contends that she was not required to prove that she applied for or was denied such admission because equity does not require the doing of a vain act. Appellant argues that similar acts have been held to be vain in cases involving governmentally enforced racial segregation, citing School Board of City of Charlottesville, Va. v. Allen, 4th Cir. 1956, 240 F.2d. 59, and Gibson v. Board of Public Instruction of Dade County, 5th Cir. 1957, 246, F.2d. 913.

School Board of City of Charlottesville, Va. v. Allen, supra, involved actions in behalf of Negro school children to enjoin School Boards from enforcing racial segregation. Applications had been made to the Boards to take action toward abolishing the requirement of segregation in the schools, and no action had been taken. The Boards contended that, before the plaintiffs would be entitled to injunctive relief, they must have individually applied for and been denied admission to a particular school. The Fourth Circuit, speaking through the late Chief Judge Parker, said:

> "* * * The answer is that in view of the announced policy of the respective school boards any such application to a school other than a segregated school maintained for Colored people would have been futile; and equity does not require the doing of a vain thing as a condition of relief."

School Board of City of Charlottesville, Va. v. Allen, supra, 240 F.2d. at pp. 63, 64.

[*Similar to Dade Case*]

The situation was almost identical in Gibson v. Board of Public Instruction of Dade County, supra. The plaintiffs had petitioned the Board of Public Instruction to abolish racial segregation in the public schools as soon as practicable, and the Board had refused. Relying upon and quoting from Chief Judge Parker's opinion in the City of Charlottesville Case, supra, this Court held that: "Under the circumstances alleged, it was not necessary for the plaintiffs to make application for admission to a particular school." 246 F.2d. at p. 914.

At least two material distinctions exist be-

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colored then the white eligible tenants would be deprived of their occupancy of the white projects and we would default in our contract with the PHA because we did not maintain a racial equity."

8. "When I went into the office I met a clerk boy, and so I told him that I wanted to apply for a house there. He took me upstairs. When I got upstairs he showed me a room and in that room were two white ladies, and so I asked them could I put in for a house there. She took me to another office where there was a white man sitting there. The white woman told me to explain it to this man, and so I explained to him, I said, 'I came to put in for a house.' He said, 'Negroes are not allowed here. Go to Fellwood.' That was his remarks to me and so I turned around and walked out."

9. "Q. It was this man here? Is that him?
"A. I wouldn't say, but he was a slender built man. I only saw him once and then for about three minutes."

tween those cases and the present case: First, in each of those cases the plaintiffs had placed themselves on record as desiring practically the same relief as that sought from the court. Here, in the absence of any attempt to apply for admission to the Fred Wessels Homes, there is no reasonably certain proof that the appellant actually desired in some earlier year, say 1952, to become a tenant in that public housing. Testimony, years after the critical event, as to what one's intentions were cannot take the place of acts done at that time. Secondly, in each of the cases relied on, it was admitted that discriminatory segregation of the races was being enforced by the defendant Board, while, as has already been indicated, in the present case, in both the pleadings and the proof, governmentally enforced segregation is denied.

[*Effect of Staub Case*]

In her reply brief, the appellant cites a third case in support of her contention that she was not required to prove that she applied for or was denied admission to the public housing project, Staub v. City of Baxley, 1958, 355 U.S. 313. The pertinent holding in that case was thus expressed:

> "The first of the nonfederal grounds relied on by appellee, and upon which the decision of the Court of Appeals rests, is that appellant lacked standing to attack the constitutionality of the ordinance because she made no attempt to secure a permit under it. This is not an adequate nonfederal ground of decision. The decisions of this Court have uniformly held that the failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review in this Court of a judgment of conviction under such an ordinance. Smith v. Cahoon, 283 U.S. 553, 562; Lovell v. Griffin, 303 U.S. 444, 452. 'The Constitution can hardly be thought to deny one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands.' Jones v. Opelika, 316 U.S. 584, 602, dissenting opinion, adopted per curiam on rehearing, 319 U.S. 103, 104."

Staub v. City of Baxley, *supra*, 355 U.S. at p. 319.

Clearly, that decision is not applicable here, for in that case the appellant had a legal right to engage in the occupation regardless of the ordinance, while here a tenant could not be admitted to a housing project without having made an application. No one could reasonably contend that by applying for admission to a public housing project the appellant would be yielding to any unconstitutional demand.

[*No Standing*]

We conclude that the appellant-plaintiff has no standing to maintain this action when she has not been denied admission to a public housing project on account of her race or color. That is the very gist of her claim. Absent such standing, there is no justiciable claim or controversy.[10]

Mr. Stillwell's testimony has been noted (footnote 7, *supra*) to the effect that in his opinion actual segregation is essential to the success of a program of public housing in Savannah. If the people involved think that such is the case and if Negroes and whites desire to maintain voluntary segregation for their common good, there is certainly no law to prevent such cooperation. Neither the Fifth nor the Fourteenth Amendment operates positively to command integration of the races but only negatively to forbid governmentally enforced segregation.[11]

The judgment of dismissal is

AFFIRMED.

10. Associated Industries v. Ickes, 2nd Cir. 1943, 134 F.2d 694, 700.
11. Cf. Avery v. Wichita Falls Independent School District, 5th Cir. 1957, 241 F.2d 230, 233; Rippy v. Borders, 5th Cir. 1957, 250 F.2d 690, 692.

GOVERNMENTAL FACILITIES
Swimming Pools—North Carolina

Deloris TONKINS et al. v. The CITY OF GREENSBORO et al.

United States District Court, Middle District, North Carolina, May 23, 1958, 162 F.Supp. 549.

SUMMARY: Eight Negro citizens of Greensboro, North Carolina, brought an action in federal district court against the city of Greensboro and its city manager, asking for a declaratory

judgment and injunction against defendants' refusal to allow them to use a swimming pool solely because of their race, and restraining defendants from selling the pool for the alleged purpose of avoiding municipal operation. The city of Greensboro had adopted a resolution offering the pool for sale. The city conceded that it could not constitutionally deny Negroes the use of public swimming facilities while permitting their use by white persons, but maintained that it did have the right to close or sell the swimming pool to preserve the "existing harmonious relationship existing between the two races." The court held that there was no positive duty imposed on the municipality to own and operate recreational facilities and that if the swimming pool were closed to all, or disposed of through a bona fide public sale, then there would be no unequal treatment or racial discrimination. The court concluded that the plaintiffs were not entitled to either a preliminary or a permanent injunction enjoining the sale. Portions of the Greensboro Council resolution of January 22, offering the pool for sale are reproduced following the opinion below.

STANLEY, District Judge:

This is an action for a declaratory judgment and injunction brought by several Negro citizens and residents of the City of Greensboro, North Carolina, on behalf of themselves and others similarly situated, against the City of Greensboro and its City Manager, in which the Court is asked to issue a preliminary injunction, pending the final determination of the cause, and a permanent injunction upon its final determination, (1) enjoining defendants from refusing to permit plaintiffs, and members of the class which they represent, to use the Lindley Park Swimming Pool in the City of Greensboro, North Carolina, solely because of the race and color of the plaintiffs and members of their class, and (2) enjoining defendants from selling the Lindley Park Swimming Pool for the sole purpose of avoiding their duty to operate same on the same terms and conditions for both Negroes and white citizens and for the sole purpose of denying the constitutional right of plaintiffs, and others similarly situated, to use said pool under the same terms and conditions applicable to white persons. The jurisdiction of the Court is invoked under Title 28 USC Section 1343(3).

With their original complaint, which was filed on March 31, 1958, plaintiffs filed a motion for preliminary injunction alleging that defendants were seeking to dispose of the Lindley Park Swimming Pool by sale on April 1, 1958. The motion came on for hearing on April 8, 1958. On that date plaintiffs filed an amended complaint and defendants filed a motion to dismiss on the ground that complaint failed to state a claim upon which relief could be granted. It was agreed, in open court, that the motion to dismiss might be heard at the same time as plaintiffs' motion for a preliminary injunction, and that the defendants' motion would be directed to the complaint as amended. In support of their motion to dismiss, the defendants introduced all the resolutions and minutes of the City Council of the City of Greensboro regarding this controversy and it was stipulated that these documents might be considered by the Court in support of plaintiffs' motion for a preliminary injunction.

[*Basic Facts Undisputed*]

The basic facts are not in dispute.

In about 1937, the City of Greensboro constructed the Nocho Park Swimming Pool which has, since the date of its construction, been operated exclusively for the use of the Negro citizens of the city. During the winter of 1954-1955, the City of Greensboro constructed the Lindley Park Swimming Pool, which was first opened to the public in May, 1955. This pool, which is the subject of the present controversy, has been operated for the exclusive use of white citizens of the City of Greensboro.

The cost of constructing the Nocho Park Swimming Pool is not available, but the cost of constructing and equipping the Lindley Park Swimming Pool was $214,958.31, which does not include any valuation on the land. During the past three seasons the City has realized revenue from the operation of the Nocho Park Swimming Pool of $5,254.90, and revenue from the operation of Lindley Park Swimming Pool of $48,220.04. During the same period the City expended $12,635.70 in the operation of the Nocho Park Swimming Pool and $33,412.56 in the operation of the Lindley Park Swimming Pool. The expenditures do not include such items as depreciation, return on investment, administrative costs, tax losses, and the like.

At a meeting on July 15, 1957, of the City Council of the City of Greensboro, Mayor George H. Roach noted that a petition, dated June 27, 1957, and signed by some 26 Negro citizens of the city, had been filed requesting that the Greensboro Public Library and Lindley Park Swimming Pool be opened to Negroes. The Mayor then read to the Council the following resolution which had been adopted by the Board of Managers of the Greensboro Public Library at its meeting held on July 3, 1957:

"The Board of Managers of the Greensboro Public Library states that the facilities of the library are available to any citizens of Guilford County who can present satisfactory identification."

[*Council Resolution*]

The following resolution with respect to the operation of city-owned swimming pools was then adopted:

"Resolution Declaring A Policy As To Public Swimming Pools

"WHEREAS, a petition has been presented to the City Council requesting that members of the Negro race be allowed to use the Lindley Park Swimming pool, which is now used by members of the white race only; and

"WHEREAS, in the opinion of the City Council, joint use of the pool at this time might disrupt relations between the races which have been harmonious until now; and

"WHEREAS, the City Council is charged with the duty of preserving the public peace in Greensboro, without which there are no civil rights for any of its citizens;

"Now, Therefore, Be It Resolved By The City Council Of The City Of Greensboro:

"That it be declared to be the policy of the City Council to maintain and operate the public swimming pools of the City for the remainder of the 1957 season in the same manner as they are presently being used; provided, however, that the City Council will, before the 1958 season, give earnest consideration to the problems raised in the petition mentioned above."

Pursuant to the foregoing resolution, the Lindley Park Swimming Pool was operated on a racially segregated basis for the remainder of the 1957 season, and on October 7, 1957, the Council adopted the following resolution:

"WHEREAS, a petition has been presented to the City Council requesting that members of the Negro race be allowed to use the Lindley Park Swimming pool, heretofore used by members of the white race only; and

"WHEREAS, the City Council resolved to maintain and operate the swimming pools of the City for the remainder of the 1957 season in the same manner as theretofore; provided, however, that it would give earnest consideration to the problems raised in the said petition before the 1958 season; and

"WHEREAS, upon the most earnest consideration, it now appears that the joint use of the swimming pools owned by the City at any time in the foreseeable future would inevitably and gravely disrupt the existing harmonious relations between the races, and the present investments in such facilities might more beneficially be liquidated and reinvested in a type of recreational facility offering service and enjoyment to a greater portion of the population of the City than that now benefiting from the operation of the swimming pools;

"Now, Therefore, Be It Resolved By The City Council Of The City Of Greensboro:

"That a public hearing be held on October 21, 1957, at 4:00 P.M. in the Council Chamber, City Hall, for the purpose of obtaining the views of the residents of the City of Greensboro as to:

"1. Their concurrence in the discontinuance of the operation of swimming pools as a function of the City Government and their disposal as property of the City.

"2. The type of recreational facility or activity most widely desired, if any, in substitution thereof."

[*Public Meeting Held*]

On October 21, 1957, in accordance with the foregoing resolution, a public meeting was held

at which a number of citizens expressed their views regarding the Council's proposal to discontinue the operation of swimming pools as a function of the city government and their disposal as public property, and the type of recreational facilities or activities most widely desired in substitution of the swimming pools. Most of the persons who appeared and spoke at the public hearing favored the sale of the swimming pools.

Thereafter, on November 18, 1957, the City Council adopted the following resolution:

"WHEREAS, a public hearing was called and held by the City Council on October 21, 1957, for the purpose of obtaining the views of the people of the City of Greensboro concerning the operation of the public swimming pools and the substitution of other facilities if discontinued, and the City Council has earnestly considered the views expressed at that hearing, which was attended by a large number of citizens, the problems involved in the continued use and operation of the pools, the capital investments therein, and the public use and benefits therefrom; and

"WHEREAS, the City Council is of the opinion that it is in the best public interest that public swimming pools be no longer operated by the City of Greensboro, and therefore the Lindley Park and Nocho Park swimming pools are no longer required for the needs, purposes and uses of the City, and their disposition should be undertaken by the City Council; and

"WHEREAS, the City Council is of the opinion that in order to provide the greatest benefit for the most people that any funds received from the sale of said properties should be used for other recreational uses and purposes;

"NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF GREENSBORO:

"1. That the City of Greensboro no longer operate public swimming pools.

"2. That the disposition of the Lindley Park and Nocho Park swimming pools be undertaken by the City of Greensboro.

"3. That the City Manager is directed to submit to the City Council proposed advertisement for the sale of said properties and he is further directed to recommend to the Council the amount of land which should be included in each sale in order to carry out the purposes of this resolution."

On January 22, 1958, the City Council adopted a resolution declaring that the City of Greensboro had no governmental or other need for the Nocho Park Swimming Pool and the Lindley Park Swimming Pool and that, in the opinion of the City Council, the best interest of the City would be served by the sale of these facilities. The resolution then provided for the sale of both pools to the last and highest bidder at public auction on the 18th day of March, 1958. All legal formalities with respect to advertising the sale were observed and the City Council reserved the right to reject any or all bids received. By resolution adopted on February 3, 1958, the date of sale was postponed from March 18, 1958, to April 1, 1958.

At the public sale on April 1, 1958, a high bid of $75,000. was received for the Lindley Park Swimming Pool, and a high bid of $9,550. was received for the Nocho Park Swimming Pool. The City Council met on April 8, 1958, and adopted a resolution rejecting both bids as inadequate.

At a meeting of the City Council held on April 30, 1958, a formal resolution was adopted providing for the public sale of both swimming pools, subject to confirmation by the City Council, on June 3, 1958, and directing that the sale be advertised in accordance with the provisions of the Charter of the City of Greensboro and the General Statutes and Private Laws of Laws of North Carolina.

Based on the foregoing facts, none of which are in serious dispute, the following questions are presented to the Court for determination: (1) Whether defendants may continue to refuse to permit plaintiffs, and other Negroes similarly situated, to use Lindley Park Swimming Pool solely because of their race and color; (2) whether defendants may sell Lindley Park Swimming Pool for the sole purpose of avoiding the duty imposed upon them to permit use of the pool by both Negro and white residents of Greensboro under like terms and conditions, and for the sole purpose of defeating the constitutional rights of plaintiffs, and others similarly situated, to use the swimming pool under the same terms and conditions applicable to white citizens; and (3) whether the complaint should

be dismissed for failure to state claim upon which relief can be granted. These questions will be discussed in the order listed.

I

Whether defendants may continue to refuse to permit plaintiffs, and other Negroes similarly situated, to use Lindley Park Swimming Pool solely because of their race and color.

With respect to the right of the plaintiffs, and other Negroes similarly situated, to use the Lindley Park Swimming Pool on the same terms and conditions applicable to white citizens, this would appear to be a moot question. The City of Greensboro, through its City Council, is firmly committed to a permanent closing and sale of the pool. In the resolution adopted on November 18, 1957, the City Council resolved "that the City of Greensboro no longer operate public swimming pools, and that the disposition of the pools owned by the city be undertaken." Mayor Roach has filed an affidavit with the Court stating "that the Lindley Park Swimming Pool is now closed by an order of the City Council and is not and will not be available for use by any person." Counsel for the plaintiffs stated in their brief that it is the present intention of the defendants to sell the pools or leave them closed, and that the only question which the plaintiffs' actions squarely presents is whether, after having received a petition from certain Negro citizens asking that they be permitted to use the Lindley Park Swimming Pool, the defendants had the right to elect to sell or close the pools rather than to carry out their duty and permit joint use. Further, the defendants concede in their brief that if a municipality chooses to operate public swimming facilities it must operate such facilities without any racial discrimination, and that the City recognizes that if it reopens its public swimming facilities it cannot discriminate against any of its citizens on the grounds of race. These concessions are in accord with the uniform holding of the courts in recent years. Clark v. Flory, 4 Cir., 237 F.2d 597 (1956).

In light of the declared policy of the City of Greensboro to no longer operate public swimming pools, and to undertake the sale of the swimming facilities which it presently owns, and the concessions made by the plaintiffs and the defendants in their briefs, there is no occasion for the entry of a declaratory judgment with reference to the rights of the plaintiffs, and other Negroes similarly situated, to use the Lindley Park Swimming Pool. The pool has been closed and there is no basis for the issuance of an injunction in regard to its use. A declaratory judgment is never granted unless there is an actual and substantial controversy before the court. In this case, there is no present necessity for a judgment declaring the constitutional rights of the plaintiffs to use the Lindley Park Swimming Pool, for there is no controversy. Federal Courts have no power to render advisory opinions or to decide in advance constitutional issues not based on present necessity therefor or issues not presented in actual cases. The Court can only enjoin future actions, not past actions. An almost identical situation was presented in Clark v. Flory, 141 F.Supp. 248 (E.D.S.C., 1956), aff'd., Cir. 4, 237 F.2d 597 (1956). While the action was pending in the district court, the State Legislature passed a statute providing that the State Park in controversy be closed until further action be taken by the Legislature with regard thereto. The district court found no occasion for the entry of declaratory judgment and dismissed the complaint since the issues had become moot by the closing of the park.

In reaching this conclusion, which I conceive to be in accord with firmly established principles of law, I am assuming that if the City of Greensboro should at sometime in the future undertake the operation of public swimming pools, it will do so on a non-discriminatory basis, as it has conceded it must do.

II

Whether defendants may sell Lindley Park Swimming Pool for the sole purpose of avoiding the duty imposed upon them to permit use of the pool by both Negro and white residents of Greensboro under like terms and conditions, and for the sole purpose of defeating the constitutional rights of plaintiffs, and others similarly situated, to use the swimming pool under the same terms and conditions applicable to white citizens.

This question seems to present the real controversy involved in this case. If the plaintiffs are not entitled to an injunction to prevent a bona fide sale of the Lindley Park Swimming Pool, it necessarily follows that they have failed to state a claim upon which relief can be granted.

The plaintiffs allege and contend that the

facts, when viewed realistically, conclusively show that the City of Greensboro resolved to close its swimming pools and undertake their sale for the sole purpose of avoiding their duty to operate the pools on a racially integrated basis, and for the sole purpose of defeating the rights of plaintiffs to use the Lindley Park Swimming Pool under the same terms and conditions applicable to white persons. The defendants on the other hand contend that the facts simply show that the City Council, recognizing that if it continued to operate public swimming facilities it must operate them on a racially integrated basis, and being of the opinion that racial integration of such facilities would disrupt the existing harmonious relationship existing between the two races, and would seriously impair the usefulness and economic value of these properties, and might lead to public disorder, decided that it was in the best public interest to close and sell these facilities at public auction and use the proceeds for other recreational uses and purposes which would be of more benefit to a greater number of its citizens.

[*Accepts Resolutions*]

I am inclined to accept the resolutions adopted by the City Council at their face value. However, I do not believe that the inferences and conclusions which might be drawn from the resolutions of the City Council in deciding to close and sell its swimming pools are determinative of the legal principles involved. For this reason, the Court feels it unnecessary to belabor the point.

It is well established that the equal protection clause of the Fourteenth Amendment to the Constitution of the United States imposes upon public officials the duty to operate publicly owned facilities without restrictions based upon the race and color of the users. Brown v. Board of Education, 347 U.S. 483 (1954); 349 U.S. 294 (1955); Muir v. Louisville Park Theatrical Association, 6 Cir., 202 F.2d 275 (1953), vacated, 347 U.S. 971 (1954); Dawson v. Mayor and City Council of Baltimore City, 4 Cir., 220 F.2d 386 (1955), aff'd., 350 U.S. 877 (1955); Holmes v. City of Atlanta, 5 Cir., 223 F.2d 93 (1955), rev'd., 350 U.S. 879 (1955); Browder v. Gayle, 142 F.Supp. 707 (M.D. Ala., 1956), aff'd., 352 U.S. 903 (1956); Simkins v. City of Greensboro, 149 F.Supp. 562 (M.D.N.C., 1957), aff'd., 4 Cir., 246 F.2d 425 (1957). The legal principles enunciated in these cases are not challenged, but they do not support the plaintiffs' theory in this case because they all deal with facilities that were being operated. The question here presented is whether the defendants have the right to close or sell the Lindley Park Swimming Pool rather than to operate it on an integrated basis. The plaintiffs contend that the answer to this question depends upon whether there is a duty imposed upon the defendants to support the Fourteenth Amendment to the Constitution of the United States. There is no question but that the defendants do have a positive duty to support the Fourteenth Amendment and other provisions of the Constitution of the United States, as these provisions are interpreted by our courts, but the question still remains as to whether or not the Constitution of the United States imposes upon a municipality the positive duty to own and operate recreational facilities.

The plaintiffs concede that this is the first case in which the right of a state or municipality to close or sell public facilities has been challenged as violative of the Constitution of the United States. Under these circumstances, they are unable to cite any authority in direct support of their position. They seek to establish as a legal theory the proposition that there is a denial of equal rights where the purpose of the closing or sale is to avoid the necessity of operating the facilities on a racially integrated basis.

[*No Requirement for Facility*]

The Court is not aware of any law in North Carolina which requires a municipality to construct or operate swimming pools or other recreational facilities. Section 160-156, General Statutes of North Carolina, declares that the creation, establishment and operation of a recreation system is a governmental function and a necessary expense as defined by Article VII, section seven, of the Constitution of North Carolina. This declaration only qualifies recreational facilities as a necessary expense in order that funds derived from ad valorem taxes may be expended on such facilities without the necessity of a vote of the people. It does not impose any obligation on governmental units to establish recreational facilities but is simply an enabling law.

Section 160-59, General Statutes of North Carolina, contains the following provisions rela-

tive to the sale of municipal property:

> "The mayor and commissioners of any town shall have the power at all times to sell at public outcry, after thirty days' notice, to the highest bidder, any property, real or personal, belonging to any such town, and apply the proceeds as they may think best."

Further, the City of Greensboro has specific legislative authority for selling the property in question. Section 79 (g) of the City Charter, which is Chapter 37 of the Private Laws of North Carolina, 1923 Session, as amended by Chapter 960, 1957 Session Laws of North Carolina, provides as follows:

> "79 (g). Sale of real property conveyed to City of Greensboro for parks, recreation and playgrounds. The city council may sell, as provided in Section 79 (c) any part of any real property heretofore or hereafter conveyed to the city for parks, or recreation or playgrounds; provided, that nothing herein shall have the effect of altering the terms or conditions of any agreement with the city or conveyance to the city relative to the use of property."

No contention is made that the City of Greensboro does not have ample authority under the laws of the State of North Carolina to sell the facility in question, or that all the laws relating to the sale of municipal property have not been compiled with. Neither is there any allegation or contention that there has been any understanding or agreement between the City and any prospective purchaser whereby the City expects to retain any control whatever over the future operation of either of the swimming pools.

In the final analysis, the plaintiffs can only complain of discrimination or unequal treatment. If the swimming pools are closed to all, or disposed of through a bona fide public sale, there can be no unequal treatment and, therefore, no racial discrimination. No citizen of Greensboro will have access to municipal swimming facilities.

Unless persons under the same circumstances and conditions are treated differently there can be no discrimination. No person has any constitutional right to swim in a public pool. All citizens do have the right, however, if a public swimming pool is provided, not to be barred therefrom solely because of race or color. If the swimming pools are closed or sold, the rights of all groups will be equal, and it must follow that the closing or sale will not discriminate against anyone.

The assumption that the Lindley Park Swimming Pool will be purchased by white persons and operated for white persons only is not supported by any evidence. At a public sale, persons of all races, including residents and non residents, are permitted to bid.

The position of the defendants seem to be sustained by two recent Fourth Circuit decisions. In Clark v. Flory, 141 F.Supp. 248 (E.D.S.C., 1956) aff'd., 4 Cir., 237 F.2d 597 (1956), where action was brought to restrain enforcement of segregation statutes in use of state park, the Court stated:

> "No one contends that this Court has the power to require the State of South Carolina to operate any park. This Court cannot by mandamus order the reopening of the closed park."

In Simkins v. City of Greensboro, 149 F.Supp. 562 (M.D.N.C. 1957), it was held that a municipality was not required to furnish a golf course for its citizens but if it undertakes to do so out of public treasury, it cannot constitutionally furnish such facilities to a part of its citizens and deny them to others similarly situated. The decree provided that the city could only dispose of the golf course property by a bona fide sale. In affirming the order of the district court, the Court of Appeals for the Fourth Circuit, in City of Greensboro v. Simkins, 4 Cir., 246 F.2d 425 (1957), used the following language:

> "Complaint is made of the provision of the order forbidding disposition of the golf course except by bona fide sale. It is clear, however, that this provision was inserted merely to prevent evasion of the court's order forbidding racial discrimination in the operation of the property; for it was followed by a reservation retaining jurisdiction and the power to modify the provision upon application of any of the parties. As pointed out in the Tate case, supra, the right of citizens to use public property without discrimination on the ground of race may not be abridged by the mere leasing of the property, the city may, however, under the terms of the order, part with the owner-

ship of the property by bona fide sale; and the court, under the power reserved, will doubtless approve other dispositions if they will not result in unlawful discrimination against citizens on the ground of race or color. Any error in the exercise of the power thus reserved will, of course, be subject to review by this court."

Assuming that the Lindley Park Swimming Pool will be sold at public auction to the highest bidder, and that there will be no collusion between the City of Greensboro and the successful bidder relating to the future operation or use of the swimming pool, except uniform restrictions imposed under zoning and other similar laws which do not restrict the class of person entitled to use the facility, the Court is of the opinion and concludes that the plaintiffs are not entitled to either a preliminary or permanent injunction enjoining the sale of the Lindley Park Swimming Pool.

III

Whether the complaint should be dismissed for failure to state claim upon which relief can be granted.

In view of the conclusions reached with respect to the rights of the plaintiff to an injunction enjoining the sale of the Lindley Park Swimming Pool, it necessarily follows that the plaintiffs have failed to state a claim upon which relief can be granted, and that the suit should be dismissed.

The Court will, however, defer the entry of a decree dismissing the suit for a period of 30 days after the sale of the Lindley Park Swimming Pool has been confirmed. If within that period the plaintiffs feel they can show that the sale was not bona fide in the sense that there was collusion between the defendants and the successful bidder regarding the future use of the pool, the Court will, upon written motion of the plaintiffs, advance the case on the docket and hear the evidence and determine the rights of the parties in accordance with the facts presented.

This 23rd day of May, 1958.

Resolution Offering Pool for Sale

Resolution Directing The Advertising For Sale Of Real Property Owned By City Of Greensboro

WHEREAS, City of Greensboro is the owner of the hereinafter described real property; and

WHEREAS, City of Greensboro has no governmental or other need for said real property; and

WHEREAS, the fair market value of said real property exceeds the sum of $15,000.00; and

WHEREAS, in the opinion of the City Council, the best interest of the City will be served by the sale of said real property;

Now, Therefore, Be It Resolved By The City Council Of The City Of Greensboro;

Section 1. That pursuant to Section 79 (c) of the Charter of the City of Greensboro, and in accordance with the General Statutes and the Private Laws of North Carolina, the real property hereinafter described will be offered for sale to the last and highest bidder at public auction at the east door of the Guilford County Courthouse in the City of Greensboro at 11:00 A.M. on the 18th day of March, 1958, said real property being described as follows:

* * *

The legal descriptions of the properties to be sold are omitted.

* * *

Section 2. The sale of said property shall be subject to off street parking requirements and all other requirements of the zoning and other ordinance of the City of Greensboro.

Section 3. Each parcel of land will be offered for sale separately; then the entire property will be offered as a whole, if requested by bidders at the sale, and the City reserves the right to sell said property in the manner it deems most advantageous to the City.

Section 4. That the minimum terms of sale shall be not less than 25 per cent cash upon delivery of deed, the balance to bear interest at the rate of six per cent per annum and to be payable in five equal annual installments, plus

interest. All or any part of the unpaid balance may be paid at any time.

Section 5. That the purchasers shall list and pay county and city taxes for the year 1958, as provided by law.

Section 6. That any offer or bid received at said sale must be accepted and confirmed by the City Council before said sale shall become effective; and the City Council reserves the right to reject any or all bids.

Section 7. That a deposit of not less than five per cent of the amount bid shall be made with the City Clerk to guarantee that, if the sale is confirmed by the City Council, the bidder will comply with the terms of his bid.

Section 8. The City does not give a warranty deed.

Section 9. That this resolution shall be published as notice of sale in the Greensboro Record once a week for four successive weeks, the first notice to be published not later than the 13th day of February, 1958.

GOVERNMENTAL FACILITIES
Urban Development—Alabama

E. F. BARNES et al. v. The CITY OF GADSDEN, Alabama et al.

United States District Court, Northern District of Alabama, Middle Division, April 28, 1958, Civ. No. 1091.

SUMMARY: In a class action against the City of Gadsden and its Housing Authority, four Negro citizens sought a preliminary injunction in Federal Court to enjoin the Authority from proceeding with slum clearance and urban redevelopment plans. Plaintiffs alleged that the program would discriminate against Negroes. The Authority had submitted plans specifying covenants against racial discrimination to obtain federal aid, and the city had not passed any ordinance, resolution or regulation requiring residential segregation. The court held that the threat of immediate and irreparable damage had not been sufficiently shown. The preliminary injunction was denied.

GROOMS, J.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause was commenced by E. F. Barnes and three other plaintiffs on behalf of themselves and others similarly situated. The defendants are the City of Gadsden, Alabama, a municipal corporation, Greater Gadsden Housing Authority, a corporation, hereinafter called the "Authority," and Walter B. Mills, as the Executive Secretary of the Authority.

The purpose of the suit is to invoke the jurisdiction of this court to redress the alleged deprivation under color of state law, statute, ordinance, regulation, custom or usage of rights, privileges or immunities secured by the Constitution and laws of the United States and acts of Congress providing for the equal rights of citizens.

The cause was heard on the motion of plaintiffs for a preliminary injunction to restrain the defendants from proceeding with slum clearance and urban redevelopment plans in two areas in Gadsden. It was heard on the sworn complaint, affidavits of Walter B. Mills, H. S. Patterson and P. M. McCall, and oral testimony submitted by the plaintiffs at the hearing.

FINDINGS OF FACT

The plaintiffs are four negroes who own property in one of the areas known as the "Birmingham Street Area." The defendant, City of Gadsden, is a municipal corporation, and defendant, Authority, is a body corporate organized and existing under the laws of the State of Alabama

under the authority of 1944 Code, Title 25 and amendments thereto, and defendant, Walter B. Mills, is the Executive Secretary and chief administrative Officer of the Authority. The Authority has adopted plans for the redevelopment of two designated areas of the City of Gadsden known as the Birmingham Street Area and North Fifth Street Area. The two areas involved are slum and blighted areas composed of substandard and inadequate housing facilities.

The Authority has acted to obtain federal aid to assist slum clearance projects under the Urban Redevelopment provisions of the Housing Act of 1949, as amended (63 Stat. 413, 414; 42 U.S.C. 1450) and has obtained such financial assistance.

The City of Gadsden has entered into a contract to provide a portion of the cost as required by the federal act above referred to and the laws of the State of Alabama above referred to.

[*Obtaining Lands*]

The Authority is proceeding to obtain the lands located within the areas by voluntary conveyances or by the power of eminent domain and plans to clear the areas by demolishing the dwellings thereon, placing new streets and utilities and otherwise improving the two areas and to then sell the two areas to private individuals or redevelopers, who shall be obligated to devote such property to the uses specified in the urban redevelopment plan for each area.

Before the Authority could obtain financial assistance from the Home Housing and Financial Administration of the federal government, comprehensive and detailed plans were required and these have been prepared, investigation made and the plans approved and the financial assistance made available.

Each of these plans contained an anti-racial covenant:

> "(C) Anti-Racial Covenant—No covenant, agreement, lease, conveyance or other instrument shall be effected or executed by the Housing Authority, or by the purchaser or leasees from it, or any successors in interest of such purchasers or leasees, whereby land in the Project Area is restricted upon the basis of race, creed, color, or national origin in the sale, lease or occupancy thereof."

The plans were approved by the City of Gadsden. The only function of the City of Gadsden is to provide its one-third of the net cost of the redevelopment and slum clearance. The carrying out of the plans will be under the direction of the Authority.

[*Comprehensive Plan*]

The City of Gadsden many years ago created a City Planning Commission and there was prepared a comprehensive outline of future municipal development known as the "Gadsden Plan," which included subdivision regulations and zoning ordinances that covered and applied to all of the territory in the municipal limits of the City of Gadsden.

The City of Gadsden has adopted no ordinance and no resolution based upon the policy, custom and usage of initiating, encouraging, enforcing and perpetuating residential segregation of the Negro and white races in the City of Gadsden, and by no resolution, ordinance or any other official action has the City of Gadsden adopted any plans intended to or that will have the effect of rezoning the Negro and white residential areas in the City of Gadsden and restricting the areas in said City which will be available to the plaintiffs and members of their class for residential purposes in the future. The City of Gadsden has adopted no resolution, ordinance or zoning regulation restricting any area in said City so as to make the same unavailable to the plaintiffs and members of their class for residential purposes in the future; the only zoning ordinances of the City applicable to residences apply to all persons and are based on types of dwellings and not types of occupants or ownership.

The City has neither instituted nor caused to be instituted any condemnation proceeding for the purpose of acquiring title to the lands of the plaintiffs and members of their class or any of their lands; and that the City does not propose to institute or cause to be instituted any condemnation proceeding for the acquisition of any of the lands.

[*Not Required To Purchase*]

None of the plaintiffs are required by any official action of the City to purchase such houses in the North Fifth Street area if they do not desire to do so.

By no ordinance, resolution or contract has

the City provided that the Birmingham Street area as redeveloped shall be limited for occupancy by white families only.

The plans of the Authority are for the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas in which private enterprise will be encouraged to serve as large a part of the total need as can be, and are not for low rent housing programs administered or assisted by the Public Housing Authority, or other public agency.

No evidence has been presented that the Authority, or the City of Gadsden, has included in the plan for the redevelopment of the Birmingham Street area that sales by private purchasers or private redevelopers will be restricted to white people only or that plaintiffs and members of their class will not be permitted to purchase the same solely because of race or color. To the contrary, this is denied under oath by the defendants.

There is no evidence that by any plan for redevelopment and sale only plaintiffs or members of their class will be permitted to own or occupy lots in the North Fifth Street area. To the contrary, this is denied under oath by the defendants.

So far as brought to the attention of the Court the plans for the sales by the Authority of the Birmingham Street area and the North Fifth Street area after redevelopment place no restrictions upon those to whom the properties may be sold.

CONCLUSIONS OF LAW

1. It is presumed that the City government intends to observe in good faith, the Constitution and laws; and bad faith cannot be imputed without substantial reason.

Pilcher v. City of Dothan, 93 So. 16, 207 Ala. 421;

Davis et al v. Arn et al., 199 F.2d 424.

2. Where not otherwise specifically provided by law, the power to make municipal contracts resides in its official governing board.

Coleman et al v. Town of Hartford, 47 So. 594, 157 Ala. 550;

United States Fidelity and Guaranty Co. v. The State for the use of the City of Gadsden, 156 So. 71, 231 Ala. 375;

Larmore and Douglas, Inc. v. Anderson, Indiana, 222 F.2d 480.

3. The Authority and defendant, Walter B. Mills, under the plans for redevelopment of the two areas and in the acquisition of lands therein contained, are acting within the authority of law and should not be controlled or revised by injunction.

Brammer v. Housing Authority, 239 Ala. 280, 195 So. 256;

Opinion of the Justices, 254 Ala. 343, 48 So.2d 757.

4. The basis of the plaintiffs' claim seems to be an apprehension that when the two areas are cleared and rehabilitated and are sold to private interests or private redevelopers, under legitimate restrictions as to use, the plaintiffs, or members of their class, may not be able to purchase property in the Birmingham Street area solely because of race or color, and, therefore, the Authority should be enjoined from carrying out its plans for slum clearance and rehabilitation.

Such sales, however, could not be action under the constraint of state law, nor would they be the performance of functions of a governmental character, nor would they clothe the acts of private individuals or corporations with the character of state action.

Dorsey v. Stuyvesant Town Corporation, 279 N. Y. 512, 87 N.E.2d 541, 14 A.L.R.2d 133;

Certorari denied by Supreme Court of the U.S., 339 U.S. 981 and annotation, 14 A.L.R.2d. 153;

Johnson v. Levitt & Sons, 131 F.Supp. 114.

Consequently this Court should not, at least at this point in the cause, grant a preliminary injunction restraining the Authority from proceeding with the execution of its plans. Such action would be premature.

5. There is not shown with the degree of certainty required the threat of immediate and irreparable damage which is real, not fancied, actual, not prospective, and threatened, not imagined. The granting of preliminary injunction is an exercise of a very far reaching power never to be indulged in except in a case clearly demanding it and only upon a showing of irreparable injury during the pendency of the action.

Yakus v. United States, 88 L.Ed. 857 (h.n. 16 & 17);

Wing v. Arnal, 198 F.2d 571 (h.n. 7 & 8);

Meiselman v. Paramount Films, 180 F.2d 94;
Petroleum Explorations v. Public Service Com., 82 L.Ed. 1294, 304 U.S. 259;
Weeks v. Alpert, 131 F.Supp. 608;
Conn. v. Mass., 75 L.Ed. 602 (h.n. 8).

This Court is, therefore, of the opinion that a preliminary injunction should not be issued.

This the 28th day of April, 1958.

ORDER ON PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION

Pursuant to the Findings of Fact and Conclusions of Law this day filed in this cause,

It is hereby ORDERED, ADJUDGED and DECREED by the Court that the plaintiffs' application for temporary injunction be and same is hereby denied.

Done and Ordered, this the 28th day of April, 1958.

INDIANS
Indian Lands—New York

TUSCARORA NATION OF INDIANS v. POWER AUTHORITY OF THE STATE OF NEW YORK, et al.

United States District Court, Southern District, New York, May 8, 1958, 161 F.Supp. 702.

SUMMARY: The Tuscarora Indian Nation, on April 19, 1958, brought an action in a federal district court seeking an injunction and a declaratory judgment against the appropriation of tribal lands by the defendant power authority. After a temporary injunction had been granted the defendants moved to change the venue to the federal court in the district where the disputed lands are situated. The court held, in transferring the case, that "Local actions . . . are to be prosecuted where the thing on which they are founded is situated." The substantial question presented was not reached.

SUGARMAN, District Judge.

On April 19, 1958, the plaintiff filed a complaint in this court for a "declaration of rights and other legal relations including a declaratory judgment or decree herein, an order for permanent and temporary injunctive relief, and such further relief as may be necessary or proper." The complaint claims jurisdiction predicated upon a matter in controversy arising under the Constitution, laws or treaties of the United States.[1]

It alleges in essence that the State of New York, pursuant to a state statute,[2] has appropriated lands of the plaintiff in Niagara County, New York State, which are part of the Tuscarora Indian Reservation. The complaint seeks, *inter alia*, a decree declaring the plaintiff's "rights and status, and more particularly adjudicating that neither the defendants nor any of them had or has the right, authority or power, to acquire or to attempt to acquire by appropriation or otherwise all or any of the lands belonging to the plaintiff within the Tuscarora Reservation"; that a preliminary injunction, a temporary restraining order and a permanent injunction issue "restraining and enjoining defendants * * * from entering upon, or taking any actions with regard to any appropriation of, land belonging to the plaintiff within the Tuscarora Reservation" and "that this Court set aside, vacate and annul all descriptions, maps, notices, and other instruments in connection with the purported appropriation."

[*Injunction Sought*]

The plaintiff, on April 19, 1958 simultaneously with the filing of its complaint, moved for a pre-

1. 28 U.S.C.A. § 1331.
2. Highway Law of the State of New York, § 30, as made applicable by the Public Authorities' Law of the State of New York, § 1007(10), as amended by L.1958, Ch. 646 (N.Y.).

liminary injunction restraining the defendants "from taking any actions to acquire by appropriation any lands belonging to the plaintiff herein." That application was brought on by show cause order which stayed the defendants, pending the hearing of the motion, "from taking any action to acquire by appropriation any land belonging to the plaintiff herein, or to enter upon said land." The plaintiff's motion for preliminary injunction was met by the defendants Power Authority and Moses by a motion filed April 23, 1958

a) to dissolve or modify the temporary restraining order aforesaid;

b) to require the giving of security by the plaintiff;

c) to set up a statutory court of three judges;

d) to give precedence to the hearing of the application for an injunction; and

e) for summary judgment.

The said defendants Power Authority and Moses simultaneously with the filing of their cross-motion on April 23, 1958, filed an answer denying the allegations of the complaint and praying for its dismissal.

On April 30, 1958 upon application of the plaintiff and after hearing all parties, the temporary restraint originally granted in the plaintiff's show cause order on April 19, 1958, was extended except that the defendants were permitted to enter upon the land in question for the purpose of making surveys, maps, examinations, borings and other similar tests. The temporary restraint was enlarged by restraining the plaintiff from interfering with the said permitted activities by defendants.

[*Special Defenses*]

On May 5, 1958 defendants Power Authority and Moses amended their answer by pleading special defenses not contained in their original answer, one of which challenges venue in this district.

By motions returnable May 6, 1958 all defendants move for transfer of this cause to the Western District of New York. The defendant Johnson, who as yet has not answered, and the defendants Power Authority and Moses who have filed an amended answer as aforesaid, base their motions upon 28 U.S.C.A. § 1392(b) and § 1406(a). Defendants Power Authority and Moses further base their motion for transfer upon 28 U.S. C.A. § 1404(a).

The defendants have timely and properly raised the question of venue. Johnson did so by motion before answer.[3] Power Authority and Moses did so by motion before amended answer prior to any action (except the extension of the temporary restraint at plaintiff's request) having been taken by the court on plaintiff's motion for preliminary injunction and said defendants' cross-motion for the relief indicated above.[4]

> "When the suit is of a local nature and involves reaching real estate or property of a fixed nature or character, it must be brought in the district in which such property is situated." [5]

> "Local actions * * * are to be prosecuted where the thing on which they are founded is situated." [6]

That this suit is one of a local nature appears beyond dispute.[7] In the case at bar, *title* to the appropriated portion of plaintiff's Indian Reservation in Niagara County in the Western District of New York is at issue and "it is perfectly plain that the venue is there, and not here." [8]

The plaintiff's strong reliance upon Philadelphia Co. v. Stimson, 1912, 223 U.S. 605, 32 S.Ct. 340, 56 L.Ed. 570 is misplaced. It is clear that that case did not involve any question of title to, or possession of, land. The Supreme Court carefully pointed out at page 622, of 223 U.S., at page 345 of 32 S.Ct., in dealing with the question of venue, that the suit

> "was not to determine a controversy as between conflicting claimants under the local law. It was not to restrain trespass * * * it was not brought to try the naked question of the *title to the land.*" (Emphasis supplied.)

> "The district court of a district in which is filed a case laying venue in the wrong * * * district shall * * * if it be in the interest of justice, transfer such case to any district * * * in which it could have been brought." [9]

3. F.R.Civ. P. 12(b) (3) and 12(h), 28 U.S.C.A.
4. MacNeil v. Whittemore, 2 Cir., 1958, 254 F.2d 820.
5. Matarazzo v. Hustis, D.C.N.D.N.Y.1919, 256 F. 882, 886.
6. Casey v. Adams, 102 U.S. 66, 68, 26 L.Ed. 52.
7. Livingston v. Jefferson, C.C.Va.1811, Fed.Cas.No. 8,411.
8. Eddington v. Texas & New Orleans R. Co., D.C.S.D. Tex.1949, 83 F.Supp. 230, and many cases there cited.
9. 28 U.S.C.A. § 1406(a).

The defendants' motions to transfer this cause to the Western District of New York under 28 U.S.C.A. §§ 1392(b) and 1406(a) are granted and it is so ordered.

In view of the foregoing, it is unnecessary to pass upon the motion by defendants Power Authority and Moses to transfer under 28 U.S.C.A. § 1404(a).

Let the clerk of this court proceed accordingly forthwith.

INDIANS

Treaty Rights—Federal Statutes

UNITED STATES OF AMERICA v. 21,250 ACRES OF LAND, etc.

United States District Court, Western District, New York, January 11, 1957, 161 F.Supp. 376.

SUMMARY: The United States brought proceedings in federal district court to condemn land on the Allegheny Indian reservation for the construction of a dam. The defendants, the Seneca Nation, moved to dismiss on the ground that the treaty which set aside the tribal lands in question could be abrogated only by a specific act of Congress. The court denied the motion to vacate, holding that the enabling legislation in this case "establishes clearly and convincingly that Congress authorized the construction of the Allegheny dam and reservoir. . . ."

MORGAN, District Judge.

On January 3, 1957, this court granted an order, ex-parte, of taking, pursuant to the language of section 258a of Title 40 U.S.C.A., of certain Indian land, known as the Allegheny reservation and occupied by the Six Nations; based upon the verified assertion of the Secretary of War that a survey of such lands and others would be necessary for the construction of the Kinzua dam.

Under the statutes of the United States, the court had the inherent power and right to grant an order of taking of possession without notice. If any person who claimed an interest in the fee or any portion thereof of said land was aggrieved thereby, such person had the right to answer within twenty days such order and litigate the question of title. Rule 71A(e) Federal Rules of Civil Procedure, 28 U.S.C.A. While the last sentence of this Rule reads, "No other pleading or motion asserting any additional defense or objection shall be allowed", notice was required to give an opportunity to the Six Nations to formally present its argument. The original informality of the appearance was dispensed with on oral argument on January 8, 1957, when counsel agreed to file such written motion and memorandum as they might be advised, as soon as possible. In the meantime, at the oral request of the court, it was agreed that the engineers would not enter until this decision was rendered, and then only if it were favorable to the petitioner.

Counsel on each side complied, and the attorney for the defendant filed a motion to vacate, asserting that the motion was timely made. As to that point, there is no dispute.

[*Necessity for Legislation*]

The second point was that the inherent right of eminent domain as to the lands in controversy does not now vest in the United States of America, and will not so vest unless, and until, the Congress of the United States passes appropriate legislation to that effect.

The third ground asserted was "that the order for the delivery of possession sought herein, being supplemental to the inherent right that is lacking, fails of its own accord and is without the power of the court to grant." This is followed by a demand that the order be vacated and the complaint dismissed. It appears that the basic statute enacted by Congress for the purpose of exercising this sovereign power was the

Act of August 1, 1888, Chapter 728, Section 1, 25 Stat. 357, 40 U.S.C.A. § 257, which conferred the power to condemn on any officer of the United States who is authorized by statute to purchase, acquire or procure real estate for the erection of a public building or other public use. This act was held to be constitutional in Chappell v. United States, 1896, 160 U.S. 499, 16 S.Ct. 397, 400, 40 L.Ed. 510, as a constitutional exercise of the power of Congress and the Court also disposed of the question of the delegation of legislative power in saying: "Nor is it necessary that congress should itself select the particular land to be taken." 160 U.S. at page 510, 16 S.Ct. at page 400. The Secretary of the Army is authorized to acquire real estate by purchase or condemnation for the improvement of rivers and harbors by Section 591, Title 33 U.S.C.A. as amended. Flood control projects are placed under the jurisdiction of and authorized to be prosecuted by the Department of the Army under the direction of the Secretary of the Army and supervision of the Chief of Engineers by Sections 701a-1 and 701b, Title 33 U.S.C.A. In addition, the Secretary of the Army is authorized and directed to acquire all lands, easements and rights of way necessary for any dam or reservoir project or channel improvement or channel reactivation project for flood control by Section 701c-1, Title 33 U.S.C.A.

[*Statutes Establish Power*]

These statutes conclusively establish the power of the Secretary of the Army to take these lands for flood control purposes, provided Congress has authorized the project. This was done as long ago as June 22, 1936, when Congress by an Act of that date enacted a comprehensive legislative scheme for flood control by Public Law 738, 74th Congress (49 Stat. 1570). Included was the Ohio River Basin, so-called, for a reservoir system for the protection of Pittsburgh, Pennsylvania, which system called for the construction of a reservoir for the Allegheny-Monongahela Basin. Various statutes were approved by the Congress (Act of June 28, 1938, Public Law 761, 75th Congress, 52 Stat. 1215, 1217). With House document 306; which discusses in great detail the proposed dam at Kinzua, Pennsylvania, before it, the Congress nevertheless enacted Public Law 228, 55 Stat. 638. The foregoing legislation establishes clearly and convincingly that Congress authorized the construction of the Allegheny dam and reservoir, not only with presumed, but with actual, knowledge of the history of the lands within the Allegheny Indian reservation, and particularly the so-called Pickering Treaty of 1794, and the Proclamation by the Congress of such treaty with the Six Nations on January 21, 1795, appearing in United States Statutes at Large, Volume 7, page 44.

In view of the concession made by the counsel for the defendant, that the sovereign power has the inherent right of eminent domain, we do not labor the point, but reassert such power in the language of United States v. Carmack, 1946, 329 U.S. 230, 67 S.Ct. 252, 91 L.Ed. 209.

[*Extends to Indian Lands*]

This power of eminent domain extends to Indian tribal lands, as it does to all lands privately owned within the United States. See Cherokee Nation v. Southern Kansas R. Co., 135 U.S. 641, 10 S.Ct. 965, 34 L.Ed. 295, referring therein to Worcester v. Georgia, 6 Pet. 515, 557, 569, 8 L.Ed. 483, wherein Justice McLean said, "in the executive, legislative and judicial branches of our government, we have admitted, by the most solemn sanction, the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a state or separate community." The court held that, "that falls far short of saying that they are a sovereign state, with no superior within the limits of its territory." See also United States v. Kagama, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 and Choctaw Nation v. U.S., 119 U.S. 1, 27, 7 S.Ct. 75, 90, 30 L.Ed. 306, wherein this pertinent language appears, "an Indian tribe * * * was capable under the terms of the constitution of entering into treaty relations with the government of the United States, although from the nature of the case, subject to the power and authority of the laws of the United States when congress should choose * * * to exert its legislative power." The court there held that the argument that the right of eminent domain within the territory of an Indian tribe can only be exercised by it, and not by the United States, except with the consent of the Indian Nation cannot be sustained; and "the United States may exercise the right of eminent domain, even within the limits of the several states for purposes necessary to the execution of the powers granted to the general government by the constitution."

[135 U.S. 641, 10 S.Ct. 970.] Specifically applicable here is the language, "It would be very strange if the national government, in the execution of its rightful authority, could exercise the power of eminent domain in the several states, and could not exercise the same power in a territory occupied by an Indian nation or tribe", holding that the lands in Indian territory, like the lands held by private owners everywhere within the geographical limits of the United States, are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it; provided only, that they are not taken without just compensation being made to the owner.

[*Subject to Review*]

The title in this case will not pass until the condemnation proceeding has been completed, at which time, the order of taking, the title, and the just amount of compensation will be subject for review. Thibodo v. U.S., D.C., 134 F.Supp. 88, at page 95; United States v. 44.00 Acres of Land, etc., 2 Cir., 234 F.2d 410, at page 415. Nor can the judiciary substitute its judgment for that of a duly empowered administrative officer; United States v. Carmack, supra [329 U.S. 230, 67 S.Ct. 254], states, "Far removed from the time and circumstances that led to the enactment of these statutes in 1888 and 1926 [40 U.S.C.A. §§ 257, 341], this Court must be slow to read into them today unexpressed limitations restricting the authority of the very officials named in the Acts as the ones upon whom Congress chose to rely."

Although the notice to vacate terms the defendants, The Seneca Nation of Indians, a "semi-sovereign body corporate", the treaty of November 11, 1794 cannot rise above the power of Congress to legislate. Moreover, the intent of Congress is plainly shown in the enactment of Chapter 3 of Title 40 as amended, that the issue of title between the United States and the property owner is not a subject of litigation, in proceedings to condemn private property for a public purpose. United States v. Burnette, D.C., 103 F.Supp. 645. As to the plenary power of Congress to dispose of tribal lands without consent of the tribe, see United States v. Creek Nation, 295 U.S. 103, 55 S.Ct. 681, 79 L.Ed. 1331; Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299; Cherokee Nation v. Hitchcock, 187 U.S. 294, 23 S.Ct. 115, 47 L.Ed. 183; Shoshone Tribe of Indians of Wind Reservation in Wyoming v. U. S., 299 U.S. 476, 57 S.Ct. 244, 81 L.Ed. 360; United States v. Klamath and Moadoc Tribes of Indians, 304 U.S. 119, 58 S.Ct. 799, 82 L.Ed. 1219.

[*Motion Denied*]

The motion made on behalf of the Seneca Nation of Indians to vacate and set aside the order for delivery of possession hereto and signed the 3rd day of January, 1957, is denied; it being determined:

(1) That the motion to vacate was timely made.

(2) That United States District Courts have jurisdiction in condemnation proceedings over Indian tribal lands as well as the lands of the several states or of private owners.

(3) The District Court has no discretion to question the decision of a public officer, but is required, when a public use is duly asserted, to issue an order of taking.

The temporary stay orally directed by the court on January 8, 1957 is released and the taking, for the purposes indicated in the complaint, is granted to the petitioner upon the filing of this decision.

ORGANIZATIONS
Boycott—Alabama

State of ALABAMA ex rel. John PATTERSON, Attorney General v. TUSKEGEE CIVIC ASSOCIATION, an Unincorporated Association.

Circuit Court, Macon County, Alabama, In Equity, June 20, 1958, No. 2159.

SUMMARY: After the adoption of legislation in Alabama which had the effect of removing

from municipal limits of the city of Tuskegee a number of previously-registered Negro voters (Alabama Act 140, 1957, 2 Race Rel. L. Rep. 856), the Tuskegee Civic Association and individual Negroes allegedly proposed a "boycott" of city merchants. The Attorney General of Alabama brought suit in a state court to enjoin the boycott and to restrain the association and persons acting in concert with it from using force or coercion or other means to carry out the boycott. The court granted a temporary restraining order. Later, on September 9, 1957, the court denied a motion to dissolve the temporary restraining order. 2 Race Rel. L. Rep. 1002. The court, in a hearing on the merits, dissolved the temporary injunction and dismissed the original complaint. The court held that while some of the Negroes had stopped trading with the white merchants, the complainant had failed to prove that the Civic Association was forcing or directing a boycott.

WALTON, Circuit Judge

This is a proceeding initiated in this court on August 15, 1957, when the State of Alabama on the relation of John Patterson, as Attorney General of the State of Alabama, filed its bill of complaint against the Tuskegee Civic Association, an Unincorporated Association. The bill of complaint, among other things, alleges that the respondent, Tuskegee Civic Association, an Unincorporated Association, has been, since June 25, 1957, and is now, engaged in carrying on, financing and conducting an illegal boycott of the white merchants of the City of Tuskegee and of Macon County, Alabama; that the respondent, Tuskegee Civic Association, an Unincorporated Association, with malice, entered into an illegal combination, conspiracy and undertaking for the purpose of hindering, delaying and preventing the white merchants of Tuskegee and of Macon County, Alabama, from carrying on their businesses; that the respondent, Tuskegee Civic Association, an Unincorporated Association, has advised and encouraged the propriety and expediency of carrying on an illegal boycott of the white merchants of the City of Tuskegee and of Macon County, Alabama; that the said respondent, Tuskegee Civic Association, an Unincorporated Association, caused to be published and circulated printed matter advising, teaching and encouraging the propriety and expediency of carrying on an illegal boycott against the white merchants of Tuskegee and of Macon County, Alabama; and averring in said bill of complaint that said alleged acts of the respondent are in violation of the statutes of the State of Alabama relating to the crime or offense of "Boycott", as set out in Chapter 20, Title 14, Code of Alabama 1940.

The bill of complaint further alleges that the respondent, Tuskegee Civic Association, an Unincorporated Association, its officers, members, and persons acting in concert with the respondent, were using force, threats, intimidation and other unlawful means to prevent citizens of Tuskegee and Macon County, Alabama, and others, from trading with or buying goods and services from the white merchants of Tuskegee and of Macon County, Alabama, who are engaged in lawful occupations and businesses; that the acts of the respondent, Tuskegee Civic Association, its officers, members, and others acting in concert with the respondent, are injuring the inhabitants of the entire community of Macon County, Alabama; that said acts are subversive of public order, tend to disturb the peace, and constitute a public nuisance; that said alleged acts of respondent association are contrary to public policy and are in restraint of trade; that said alleged acts of the respondent association are malicious, and are causing irreparable injury and damage to the public welfare, and causing irreparable damage to the rights of the citizens of Macon County, and particularly to the white merchants of Tuskegee and of Macon County, Alabama.

[*Duty To Seek Relief*]

The bill further avers that the State of Alabama has a duty to seek the relief prayed for in the bill of complaint, and to protect the citizens of Macon County and of the City of Tuskegee from invasion of their constitutional rights; and the bill further avers that there is no adequate remedy at law.

The bill of complaint prayed for both a temporary and a permanent injunction, enjoining the respondent, Tuskegee Civic Association, an Unincorporated Association, its officers, members, agents, employees, servants, followers, attorneys, successors, and all persons acting in concert with the said respondent association, from using any threats, force, intimidation and

coercion to prevent others from trading with or purchasing goods or services from the white merchants of the City of Tuskegee and of Macon County, Alabama, and from violating the provisions of Chapter 20, Title 14, Code of Alabama 1940, and from taking part in any combination or conspiracy for the purpose of hindering or injuring the white merchants of the City of Tuskegee and of Macon County, Alabama in the conduct of their businesses.

Attached to the bill of complaint are several exhibits in support thereof.

[*Temporary Injunction Ordered*]

The bill of complaint was duly presented to the court on August 15, 1957, and the court ordered that a temporary injunction be issued in accordance with the prayer of the bill of complaint. Such injunction was accordingly issued.

On August 27, 1957, the respondent, Tuskegee Civic Association, an Unincorporated Association, duly filed its motion to dissolve the temporary injunction, and the court fixed September 6, 1957, as the day for hearing said motion. No testimony, of course, was had on said hearing of the motion to dissolve the temporary injunction; but both the complainant and the respondent filed affidavits as provided by law: Upon consideration, the court, on September 9, 1957, overruled the motion to dissolve the temporary injunction.

On September 25, 1957, the respondent, Tuskegee Civic Association, an Unincorporated Association, filed its motion to have said cause set down for a hearing on the merits, as by the statutes of Alabama in such cases made and provided. The court thereupon fixed the 31st day of December, 1957, as the day for the hearing on the merits; and for good and sufficient reasons the day of the hearing on the merits was continued to January 21, 1958.

On January 21, 1958, the court heard the testimony of witnesses in said cause, and the hearing on the merits in this court was concluded on January 22, 1958. At the conclusion of the hearing on the merits, the court requested the parties to file briefs with the court. The court has been greatly aided by the excellent briefs filed by the parties in the cause.

On the hearing on the merits in this court, the complainant offered testimony relating to the meetings held by the Tuskegee Civic Association, an Unincorporated Association, on July 15, 1957; July 23, 1957; July 30, 1957; August 6, 1957, and August 13, 1957. Witnesses who had attended some or all of these meetings were offered by the complainant. The witness, Stuart Culpepper, a reporter for Montgomery Advertiser, testified as to what he heard certain speakers say at one or more of these meetings. The same was true of the witness, Gertrude Cargile, a staff reporter for the Birmingham News. The complainant, also, offered as a witness Joe Malone, an assistant attorney general, who testified as to what he heard at these meetings of the Tuskegee Civic Association, an Unincorporated Association.

[*Merchants Testify*]

The complainant, on the hearing on the merits, offered as witnesses several white merchants of the City of Tuskegee, each of whom testified that his business and sales were off during the period from July, 1957 to the date of the hearing. Some of these witnesses testified that the fall-off was due to the Negroes not trading with them or buying goods from them, and most witnesses were not sure or were somewhat vague as to why their business had fallen off, while still others testified on cross examination that during the period inquired about business and sales were usually and normally lower than in other seasons of the year.

The complainant offered certain handbills or circulars alleged to have been found on the premises of the respondent, Tuskegee Civic Association, an Unincorporated Association. The complainant, also, offered witnesses relating to the statement or policy of the respondent and relating to the "Economic Actions Committee." There were witnesses offered by the complainant, also, relative to alleged threats made against them for trading with the white merchants of Tuskegee. Some of this testimony was admitted, and a part of it was excluded, as shown by the record.

The respondent, Tuskegee Civic Association, an Unincorporated Association, offered witnesses who testified that at no time, at any of the meetings of the Tuskegee Civic Association, an Unincorporated Association, was any reference made to the white merchants of Tuskegee and of Macon County, Alabama; that the respondent was not engaged in any boycott, nor was the respondent financing or otherwise encouraging

any boycott of the white merchants of Tuskegee and of Macon County, Alabama. The respondent offered as witnesses officers of the respondent association, who testified that at no time was the respondent engaged in any boycott of the white merchants of Tuskegee and of Macon County, Alabama; that the respondent had never made or authorized any person to make any threats against any person in the matter of trading or buying goods or services from the white merchants of Tuskegee and of Macon County, Alabama.

[*Purposes of Club*]

The testimony of witnesses for the respondent association on the hearing further was to the effect that the Tuskegee Civic Association was founded in 1938, and was known at that time as "The Tuskegee Men's Club." One witness testified in substance that the objective of the Tuskegee Civic Association, an Unincorporated Association, was to promote the civic welfare of the community, to improve the economic, political, educational, social and religious condition of the people living in and around Tuskegee, and other objectives.

The respondent's testimony tended to show that at no time had the Tuskegee Civic Association, an Unincorporated Association, urged or threatened or intimidated any person relative to trading with or buying goods or services from the white merchants of Tuskegee and of Macon County, Alabama.

The specific charge in this case is that the respondent, Tuskegee Civic Association, an Unincorporated Association, is engaged in conducting a boycott, or conspiring with others to boycott the white merchants of the City of Tuskegee and of Macon County, Alabama, and the specific question before the court is whether to make the injunction permanent or to dissolve the temporary injunction heretofore issued by the court.

[*Resentment*]

The court is impressed with the fact, and the fact is fairly obvious, that since the passage of an act by the Legislature of Alabama removing from the City of Tuskegee a goodly number of Negro voters, there has been certain resentment against the enactment of this statute. The court is, also, convinced from the testimony offered that the Negroes in and around Tuskegee, or a number of them, have to some degree abstained from doing business with the merchants, or some of the merchants, of the City of Tuskegee. In this connection, from all the merchants of the City of Tuskegee, only a small number appeared as witnesses on the hearing on the merits.

It is pertinent to note that in the bill of complaint no allegation refers to the boycott of any particular merchant in the City of Tuskegee and of Macon County, Alabama; but the allegations refer generally to "The white merchants of Tuskegee and of Macon County, Alabama."

It is one thing to say that the Negroes of Tuskegee and of Macon County, Alabama have stopped trading with the white merchants of Tuskegee and of Macon County, Alabama, and still another thing to say that the Tuskegee Civic Association, an Unincorporated Association, the respondent in this cause, is engaged in, sponsoring, and conducting a boycott, and is joining in a conspiracy to boycott the white merchants of Tuskegee and of Macon County, Alabama. As to the fact, clearly obvious from the testimony offered on the hearing, that numbers of Negroes in Tuskegee and Macon County, Alabama, have refrained from trading with the white merchants of Tuskegee and of Macon County, Alabama, we have nothing to do, except insofar as the respondent, Tuskegee Civic Association, an Unincorporated Association, may be involved.

[*Issues*]

The inquiries in this case are:

1. Is the respondent, Tuskegee Civic Association, an Unincorporated Association, engaged in a boycott of the white merchants of Tuskegee and of Macon County, Alabama?

2. Is the respondent, Tuskegee Civic Association, an Unincorporated Association, conducting, financing or conspiring with others in staging a boycott, as charged in the bill of complaint?

3. Is the respondent, Tuskegee Civic Association, an Unincorporated Association, now, or has it in the past, threatened, coerced or intimidated others in the matter of their buying goods or services from the white merchants of Tuskegee and of Macon County, Alabama?

Except for these questions, constituting the

issues in this case, all other matters are extrinsic and irrelevant.

There are involved in this proceeding many alleged issues. There is the question and issue of a conspiracy on the part of the respondent, Tuskegee Civic Association, an Unincorporated Association, as alleged in the bill of complaint. The court is familiar with the law relating to conspiracy; and, of course, a conspiracy may be proven by circumstantial, as well as by direct testimony. But when a conspiracy is sought to be established by circumstantial evidence, it must be so strong as to reasonably satisfy the court of the existence of such conspiracy. The court is not satisfied that the Tuskegee Civic Association, an Unincorporated Association, respondent in this cause, entered into a conspiracy for the purpose of instituting and sponsoring a boycott of the white merchants of Tuskegee and of Macon County, Alabama.

The question of a public nuisance is involved in this case, as alleged in the bill of complaint. It is well established that upon a proper showing, a court of equity may issue an injunction to abate a public nuisance. Suffice it to say that, in the opinion of the court, the testimony fails to show that the respondent, Tuskegee Civic Association, an Unincorporated Association, has contrived to bring about a public nuisance, or that a public nuisance, in fact, exists.

The basis of the allegations in the bill of complaint is that the respondent, Tuskegee Civic Association, an Unincorporated Association, was conducting a boycott of the white merchants of Tuskegee and of Macon County, Alabama, all as set out in the bill of complaint, and contrary to the provisions of Chapter 20, Title 14, Code of Alabama 1940.

It is generally agreed by the courts that the word "Boycott" is not easily defined. Boycott has been defined as "An illegal conspiracy in restraint of trade."—Walsh v. Association of Master Plumbers, 71 S.W. 455.

It has, also, been determined that "A boycott means a refusal to sell to or to do business with the concern and preventing anybody else from doing business with it on any conditions." Park & Sons v. National Wholesale Druggists Association, 67 N.E. 136-139.

The word "Boycott" is usually understood as a combination of many to cause loss to one person by coercing others against their will, to withhold from him their beneficial intercourse through threats that, unless the others do so, the many will cause similar loss to them.—Toledo A.A. & N.M. Railroad Co. vs. Pennsylvania Co., 54 Fed. 730-736.

[*"Confederation" Essential*]

It has, also, been established: "The essential idea of boycott is a confederation, generally secret, of many persons, whose intent is to injure another by preventing any and all persons doing business with him, through fear of incurring the displeasure, prosecution and vengeance of the conspirators." In Re Crump, 6 S.E. 620-627.

Any further discussion of the word, term and offense designated as "Boycott", in the opinion of the court, would serve no good purpose. Suffice it to say that, in the opinion of the court, based on the testimony on the hearing, that the respondent, Tuskegee Civic Association, an Unincorporated Association, is not engaged in a boycott of the white merchants of Tuskegee and of Macon County, Alabama. As stated heretofore, this is not to say that there is no action by the Negroes of the community in withholding their business relations with at least some of the merchants of Tuskegee. The court is not convinced, however, from the testimony adduced on the hearing, that the respondent, Tuskegee Civic Association, an Unincorporated Association, sponsored or conducted any of the actions or acts of the Negroes of the community who did and are withholding their business relations from the merchants of Tuskegee and of Macon County, Alabama. It is shown by the testimony that the respondent, Tuskegee Civic Association, an Unincorporated Association, did endorse the proposition of "Trade with your friends", and urged their members to do so. It may well, also, be that the Negroes of the community, from the testimony adduced on the hearing, decided to refrain from business relations with all people other than their friends. The witness, George C. Busby, offered by the complainant, testified that he had resided in Tuskegee for over thirty years; that he had been a member of the Tuskegee Civic Association, an Unincorporated Association for a long time; that he had, on account of the legislative act in gerrymandering out of the city limits of Tuskegee several hundred Negro voters, stopped trade with the merchants of Tuskegee; that he

did not intend to resume his trading with the merchants of Tuskegee, and that the Tuskegee Civic Association, an Unincorporated Association, the respondent in this case, had nothing to do with his making up his mind to take this action.

[*Who Are "Friends"?*]

As heretofore stated, the court, upon consideration of the testimony adduced on the hearing, together with the pleadings on file, is reasonably satisfied that the Negroes, or some of them, in and around Tuskegee, Alabama, have decided to trade at places other than with the merchants of the City of Tuskegee and of Macon County, Alabama. There is, however, no testimony in this cause relative to white merchants other than the white merchants of the City of Tuskegee. The court is further of the opinion that, from the testimony adduced on the hearing, there is very little testimony to the effect that the Tuskegee Civic Association, an Unincorporated Association, has directed any attack upon the white merchants of Tuskegee or of Macon County, Alabama. It is true that the respondent association advocated trading with their friends; but there is no testimony that the white merchants of Tuskegee, as a matter of fact, were not their friends.

Thus far in this land, every person has a right to trade with whomever he pleases and, therefore, the right to not trade with any particular person or business. It has, also, long been the established law under the constitution that any person may say what he pleases at any public assembly, subject to being held liable for any violation of the law.

There is testimony in the case relating to certain alleged threats against persons who were trading with certain merchants in the City of Tuskegee. There is no testimony that the respondent, Tuskegee Civic Association, an Unincorporated Association, had anything to do with such alleged threats other than that some of the alleged perpetrators were or had been members of the Tuskegee Civic Association, an Unincorporated Association, membership in the association, according to the testimony, being on an annual basis. This is not sufficient upon which to base the allegation that the respondent association authorized such threats or intimidation, as the mere fact that a person might have been a member of the respondent association would not in any sense carry the implication that he was authorized and urged by the Tuskegee Civic Association, an Unincorporated Association, to make any threats against any person trading with the white merchants of the City of Tuskegee.

[*Complainant Must Prove*]

This case, of course, is like any other case in law or in equity. The burden of proof rests upon the party making the allegations and averments. The burden of proof in this case is upon the complainant; and, in the opinion of the court, the complainant has failed to carry this burden. It, therefore, follows that, in the opinion of the court, the complainant having failed to carry the burden of proof, is not entitled to the relief prayed for, and the temporary injunction heretofore issued ought to be dissolved.

It is, therefore, ordered, adjudged and decreed by the court that the temporary injunction heretofore issued in this cause be and the same is hereby dissolved, the original bill of complaint is dismissed, and the costs incident to this proceeding are taxed against the complainant.

Done at LaFayette, Alabama this the 20th day of June, 1958.

ORGANIZATIONS

NAACP—Florida

In re: Petition of Graham

Supreme Court of Florida, June 18, 1958, 104 So.2d 16.

SUMMARY: A 1957 Florida statute authorized the appointment of a Legislative Committee to investigate "organizations advocating violence or a course of conduct which would con-

stitute a violation of the laws of Florida." See 3 Race Rel. L. Rep. 784, *infra*. The Committee served petitioner, an officer of the National Association for the Advancement of Colored People, with a subpoena requiring him to produce information pertaining to the NAACP and the Florida Council for Human Relations. Petitioner moved to quash subpoena, but the Circuit Court refused. From that order an appeal was taken to the district court of appeal and, subsequently, the Supreme Court of Florida. In affirming the denial the Supreme Court rejected petitioner's contention that the Committee had exceeded its scope of inquiry and that the act creating it was unconstitutional. The court found that issuance of the subpoena was within the Committee's jurisdiction and that the inquiry did not infringe any constitutional rights of the petitioner, saying "no court will speculate in advance as to what a committee will do or that it will violate the law fixing one's right in a proceeding of this kind and there is no showing or reason for suspicion at this time."

Before TERRELL, C.J., HOBSON, DREW, THORNAL and O'CONNELL, JJ.

TERRELL, Chief Justice.

Chapter 57-125, Florida Statutes 1957, created the Florida Legislative Investigation Committee and clothed it with certain powers. It will hereinafter be referred to as the Committee. It forthwith served Edward T. Graham with a subpoena duces tecum requiring him to produce at a stated time and place all books, records and lists of memberships pertaining to the National Association for the Advancement of Colored People and the Florida Council for Human Relations.

February 18, 1958, Graham as petitioner moved to quash said subpoena on the ground that its requirements were beyond the Committee's scope of inquiry and that the act creating it was unconstitutional, in that it violated the First and Fourteenth Amendments to the Constitution of the United States and Sections 12 and 22, Declaration of Rights, Constitution of Florida. February 25, 1958, the Circuit Court entered an order denying the motion to quash. From that order an appeal was taken to the District Court of Appeal, Third District, which appeal was timely transferred to this court.

[*Claim of Unconstitutionality*]

It is first contended that Florida Statute 57-125 is violative of Section 16, Article III of the Constitution, in that it contains more than one subject matter not properly related to the title.

There is no merit to this contention. Casual examination shows that the assaulted act contains but one subject matter and that the title is ample to put any reasonable person on notice of its provisions. Copeland v. State, (Fla.), 76 So.2d 137; Wright v. Board of Public Instruction, (Fla.), 48 So.2d 912; State v. Florida Turnpike Authority, (Fla.), 80 So.2d 337.

The real point in the case is whether or not the subpoena duces tecum is in violation of the First and Fourteenth Amendments to the Federal Constitution and Sections 12 and 22 of the Declaration of Rights, Constitution of Florida.

Appellant contends that this question requires an affirmative answer and relies on Watkins v. United States, 77 S.Ct. 1173; Sweezey v. State of New Hampshire, 77 S.Ct. 1203, and N.A.A.C.P. v. Patty, 159 F.Supp. 503, to support his contention. An examination of these cases leaves us with a different conclusion from that reached by petitioner. In the Watkins case the court, among other things, held that the "vice of vagueness" relative to pertinency of the question involved in the point of inquiry must be avoided in order to sustain a conviction for contempt of Congress under Federal law. It then pointed out how the "vice of vagueness" could be avoided.

[*Point Premature*]

If the point may be shown to have merit it is premature because the legislature has the power to authorize investigation into alleged unauthorized activities and so long as any question propounded or step taken in the inquiry does not infringe on constitutional rights of the person investigated, they are permissible. The time to raise the point would be when the question is propounded or when the step is taken. Such is the doctrine of the Watkins case. We have

examined Sweezey v. State of New Hampshire and N.A.A.C.P. v. Patty, and we do not think they have any relation to the case at bar so they are not discussed.

To be more specific as to the objection raised here, we might say that it has to do with the provision of the subpoena duces tecum requiring petitioner to produce "all books, records, and lists of memberships pertaining to the National Association for the Advancement of Colored People and the Florida Council for Human Relations," and to otherwise testify.

[*Investigative Powers*]

The Committee had power to investigate the activities of these organizations if it had reasonable ground to believe they were engaged in conduct inimical to our country. Appellant also had a right to security in its constitutional guaranties when this was being done but there is no showing whatever that any of these guaranties have been, or are about to be, violated. None of the fears enumerated in appellant's brief have materialized and in fact cannot materialize until unlawful steps have been taken or unlawful or impertinent questions have been propounded to petitioner when the inquiry gets under way. It cannot be done before this and then the pertinency of questions must be shown if the point is raised.

It is true that the opinion in the Watkins case contains the quotations relied on by appellant but it also contains the doctrine to the effect that the court "cannot assume that the questions to be asked or the books to be produced will violate any constitutional privilege guaranteed the petitioner." The Watkins case further supports the theory that the "legislature is free to determine the kinds of data that should be collected and that when the question of pertinency is raised, it must be explained." None of these matters can be determined in advance of the hearing.

In his effort to have the court speculate and prophesy in advance that the Committee will exceed its authority, the appellant appears to have taken his cue from the famous epigram of Bismarck, "to retain respect for sausages and laws, one must not watch them in the making." A nice appreciation of the Iron Chancellor's theory suggests more than is necessary to dissertate on at this time. It is enough to say that courts do not travel that road. The act involved must be shown to be unconstitutional or the procedure under it must violate some right of the one assaulting it.

No court will in advance speculate as to what a Committee will do or that it will violate the law fixing one's right in a proceeding of this kind and there is no showing or reason for suspicion at this time. McGrain v. Daugherty, 47 S.Ct. 319, 273 U.S. 135; Barsky v. United States, 167 F.2d 241, certiorari denied 68 S.Ct. 1511. This view is also supported by the answer to appellant's contention in the order of the Circuit Court denying the petitioner's motion to quash.

The decree appealed from is accordingly affirmed.

Affirmed.

TERRELL, C.J., HOBSON, DREW, THORNAL and O'CONNELL, JJ., Concur

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PUBLIC ACCOMMODATIONS
Private Clubs—New Jersey

SUN AND SPLASH CLUB, Inc., et al. v. DIVISION AGAINST DISCRIMINATION, DEPARTMENT of EDUCATION, et al.

Superior Court, Law Division, Middlesex County, New Jersey, October 11, 1957. Docket L-12551-56 P.W.

SUMMARY: The New Jersey Division Against Discrimination, acting on a complaint by eight Negroes who alleged that they had not been allowed to swim in the "Sun and Splash

Club" because it was a "private club," sought to subpoena certain records to determine whether the club qualified as a private organization and therefore was not required to admit complainants. The club brought an action in Superior Court denying the Division's power to issue the subpoena. The court, after hearing, found the Division to be acting within the powers specifically granted by the applicable legislation and ordered the club to comply with the subpoena. The transcript of the hearing is reproduced below.

Transcript of stenographer's notes of proceedings in the above entitled matter, taken before HON. PETER P. ARTASERSE, Superior Court Judge, at the Middlesex County Court House in the City of New Brunswick, New Jersey, on the eleventh day of October, A. D. 1957.

* * *

The Court: Was there a counter affidavit in any way filed here, Mr. Strong?

Mr. Strong: Your Honor, there was a cross motion for summary judgment, with an affidavit.

The Court: The only affidavit, as I see it, from the complaint, is by Edgar Reed.

Mr. Strong: That is correct, Your Honor.

The Court: Is it conceded these eight persons were not admitted to the swimming facilities?

Mr. Strong: We don't know, sir. The first thing we heard about any of these people was when we were served with a subpoena.

The Court: Mr. Cook, does that raise a fact question?

Mr. Cook: Your Honor, of course that would be a fact question at the hearing. But all of that evidence is not material at this particular time. This is an action in the nature—in lieu of prerogative writ, to quash the subpoena which the Commissioner has served on Mr. Reed, the manager of the Club, to obtain some records, on the basis of which the Commissioner was going to try to determine whether that pool is a place of public accommodation, or a private club. Now, whether anybody was actually excluded from that or not, as a matter of fact, would be determined at the hearing, but that is not before the Court on this motion.

The Court: I didn't read the complaint. What Mr. Cook has just said apparently is so, isn't it, Mr. Strong?

Mr. Strong: What is that, Your Honor?

The Court: That the object of the complaint filed in this matter, in lieu of prerogative writ, is merely to quash the subpoena?

Mr. Strong: Yes, that is the object.

The Court: The sole object of the suit?

Mr. Strong: The sole object of the suit.

Mr. Cook: As long as Mr. Strong brought this matter to Court by this proceeding, I thought it was in order at the same time, as part of my motion for summary judgment, to ask the Court for an order under Rule 4:46-5, to compel the respondent to comply with the subpoena. I think as long as we are before the Court, we are making the same motion.

The Court: Can you do that in a proceeding of this kind, where he moves to quash the subpoena?

Mr. Cook: And we counter move to enforce it.

The Court: I don't think you can do it in a proceeding of this kind.

Mr. Strong: It is a statutory proceeding.

Mr. Cook: No. It is under the rule. Under Rule 4:46-5, you can proceed by a motion.

The Court: I think I understand what you are talking about. Just a moment until I get the rule. It seems to me that since Mr. Strong is seeking affirmative relief, you are denying that relief, and then you are seeking affirmative relief, it seems to me that you ought to file something before the Court, a petition, or an order to show cause, or something.

Mr. Cook: Well, that is what I meant by my notice of motion, Your Honor, was for two things: One, for summary judgment on Mr. Strong's action, to the effect that the subpoena should not be filed. And two: for an order pursuant to Rule 4:46-5, directing the plaintiff to comply with the subpoena.

The Court: Assuming that I were to dismiss this suit, what happens then? Can I give relief to you?

Mr. Cook: I don't know why not, Your Honor. We are in Court here, and I have made a motion supported by an affidavit.

The Court: It would seem to me that you ought to start some independent action. But we will get to that in a few moments, Mr. Cook. Does

the statute permit you to apply ex parte, or must you do it on notice?

Mr. Cook: We do it on notice. We have given notice.

The Court: What you are saying, Mr. Cook, is that instead of presenting before the Court a new notice, or another notice of motion, you have incorporated it in the same one, seeking to set aside, or rather seeking to dismiss the prerogative—the complaint in lieu of prerogative writ?

Mr. Cook: That is right, Your Honor. Both of these motions raise the same question before the Court.

The Court: All right. I understand. I take it that the Division against Discrimination, Department of Education, is a State Administrative Agency, and the plaintiff in this case would always have a right to an appeal to the Appellate Division from any determination by that agency.

Mr. Cook: Oh, yes, Your Honor. I believe in our statute an appeal from a determination of the Commissioner goes to the County Court in the first instance, but there is a right of appeal.

The Court: To the County Court? Because our rules provide, don't they, that all appeals from State Agencies go to the Appellate Division of the Superior Court?

Mr. Cook: That is correct. As a matter of fact I am not sure which Court it would go to. The Rules say you can go to the Appellate Division. We haven't had an appeal yet under this.

The Court: Saulsberry v. Winberry, or Winberry v. Saulsberry, if it means anything, I am afraid that the provision in the statute does not apply, and you would have to conform with the rules of the Court, and you would have to go directly, or rather, the offended or aggrieved party would have to go directly to the Appellate Division. As a matter of fact, I think I may have determined something like that in some other legislation, where it had to be construed. Although the statute said one thing, I held that since the rules of the Court took precedence, that instead of going to, I believe it was the Superior Court in that matter, they had to go from the administrative agency to the Appellate Division. And although your statute reads the County Court, I am inclinded to believe that an appeal from your division or agency would have to go to the Appellate Division. As a matter of fact I think that I may have determined something like that in some other legislation, where it had to be considered. Although the statute says one thing I held that since the rules of the Court took precedence, that instead of going to, I believe it was the Superior Court in that matter, they had to go from the administrative agency to the Appellate Division.

Mr. Cook: Fortunately we have only had one case that went up on appeal under this Statute, and that went to the County Court and the appeal was never prosecuted, and I had the appeal dismissed.

The Court: I notice, Mr. Strong, you had a case against Jersey City, in which the Supreme Court said that the records, the personal and private records were subject to subpoena, and had to reveal them, and had no right of privacy, and I had it dismissed.

I used to be president of the Jersey City Tax Board and we used the subpoena method of getting solicited information concerning the assets of various corporate tax payers in Jersey City, for the purposes of assessing, and I notice you came around to the case of the appeal of the Pennsylvania Railroad, where that subpoena right was upheld, and Senator O'Mara's firm, representing the Pennsylvania Railroad, lost out on the appeal.

Gentlemen, you may proceed.

Mr. Cook: If Your Honor please, since you have read most of the papers and the briefs, I think I can get right to the point of what appears to me to be the two principal points of contention here: Number one, as I see it, Mr. Strong's contention is that the use of the subpoena at this point in the Commission's investigation is premature; that the Statute does not authorize the use of the subpoena while the Division is still investigating a complaint, and before they have entered into conciliation proceedings, and so forth.

Now, I think the language of the statute is broad and clear on that point. It authorizes the Commissioner to receive, investigate and pass upon complaints alleging acts of violation, and so forth, and to hold hearings, subpoena witnesses, and to require the production of books and records, and so forth, with relation to any matter under investigation or in question before the Commissioner. Now, I see

nothing in the statute which says the Commission cannot use subpoena powers until after he has sent out notice of public hearing and investigated only at that time.

Now, there is a good reason why he should have the subpoena powers in connection with the investigation. And this case really points it up. In the first place, the use of the club name in itself indicates that the plaintiffs are relying upon the device of a private club to avoid the contention of the law. Furthermore, five of these complaints allege that when these colored children went to the pool to use it, they were told, this is a private pool, you cannot get in unless you are a member. Now, that means that it is necessary for the Commissioner, in the first instance, to find out whether or not this is a bona fide private club or not. If it is, the Commissioner has no further jurisdiction over the case. If it is not, then all the conciliation efforts of the division would be directed at eliminating the use of this club device as a means of discrimination; so that is the reason why, at this stage of the proceedings, it is necessary for us to subpoena these records as being the only practical way for him to determine whether this is actually operated as a bona fide private club or not.

The Court: Was this plaintiff incorporated under the statute not for pecuniary profit, or is it under the general corporation act?

Mr. Cook: I believe it is incorporated under title 15, is it not?

Mr. Strong: I believe it is not for pecuniary profit. I believe so.

Mr. Cook: Of course, we maintain that even though that may be so, still its relationship to the landlord corporation, and all the other factors, must be considered in determining whether it really is such a club, or is actually a place of public accommodation, conducted under the guise of the club.

Now, the other point I think is simply this, as Mr. Strong has on the next to the last page of his brief, that we are trying to examine records belonging to Mr. Reed, which are purely his own private affairs, having nothing to do with the club.

The Court: Who is Mr. Reed?

Mr. Cook: He is the general manager of the club, and one of the plaintiffs in this action.

Now, going over these items that were requested in the subpoena, that is, the ones that have been objected to, first is number four, which is the payroll of the defendant Splash Club for the years 1955, 1956 and 1957.

Mr. Strong: We objected to all of them.

Mr. Cook: Well, I didn't notice you objected to one, two, three and so forth.

Mr. Strong: We objected to everything.

The Court: Where are they listed?

Mr. Cook: They are listed in the complaint, Your Honor, beginning with paragraph eight; paragraph eight of the complaint alleges that paragraph four of the subpoena is defective in that there is no relation to any such matter under investigation, and it violates the right of privacy of the plaintiff Sun and Splash Club, and all the other allegations following that are similar except in one or two instances it is alleged that the items called for in the subpoena violate the rights of privacy both of the Club—

The Court: What are the specific charges? I read them somewhere.

Mr. Cook: The subpoena is attached to the complaint. Item number four, the payroll of the defendant Splash Club for 1955, 1956 and 1957, well, that certainly is not a private paper of Mr. Reed; it would seem to me to be a paper belonging to the Club. Mr. Reed's private affairs are certainly not interested in that. The payroll expenditures are extremely material in showing the relationship of Mr. Reed and his family to the Club, and as to what extent they were on the payroll, and so forth. And that, and a number of these other items bear on the whole question of the financial relationship and the control of Mr. Reed and his family, who I believe have financial control of the landlord corporation; and have also in this club.

Now, five and six have to do with membership applications of the Club, including all those previously contracted or presently pending. These are material for at least two reasons: Number one, they are needed to determine whether the rejection of many of these applications were on the basis of color, or not.

The next three items, cancelled checks, bank account books, and bank statements. First with the cancelled checks on all business done, including salaries, by and for the defendant Splash Club for the past three years.

The Court: Would a cancelled check show you anything, or prove anything to you? I just wondered how that would help in the investigation.

Mr. Cook: It is part of the financial records, Your Honor.

The Court: In other words, we don't want to unduly harass the Club, or the party under investigation. I am just wondering whether cancelled checks have any relation to the investigation.

Mr. Cook: Well, it is just showing cash expenditures; that is what it is.

The Court: Well, wouldn't the books show that?

Mr. Cook: We don't know. We don't know whether they are accurate.

The Court: When you say bank account books—

Mr. Cook: Of Reed and the defendant Splash Club.

The Court: Well, you don't say that.

Mr. Cook: Well, I would certainly be willing to qualify the subpoena, that those same three years be listed.

The Court: What can the bank statements show you as to whether they were discriminating?

Mr. Cook: Well, Your Honor, it is the information we get from going over these financial records that would show in fact how the enterprise is run, and who makes the profits on it, and what the relationship of the Club is to the landlord, and so forth. You have to go into these financial transactions.

The Court: Would that be necessary to get the financial checks? Could you ascertain that through some other way? The only thing I am concerned about, would you be unduly harassing this particular club, so-called?

Mr. Cook: Item number ten is copies of any income tax returns that Mr. Reed, or the Sun and Splash Club may have. These are important, it seems to me, to determine whether the Club is actually operating at a profit, or whether Mr. Reed is making a profit out of it, even though it may be claimed to be a non-profit organization.

And finally we get down to items thirteen and fourteen, the minutes of the membership meetings, and committee meetings, and so forth, and the constitution and bylaws of the Club. These are essential to determine who actually controls the Club, who passes on new members, and why, and what the rights of members are when they join this club, and so forth. There again all items like that were looked into in the Beach Club case, and were found to be very material in the Court's decision. So we submit that this subpoena is not unreasonable or oppressive, and that all the items in there should be made available to the Division, unless it is possible for Mr. Reed to separate out of any of these things whatever private records he might have which have nothing to do with his Sun and Splash Club operation.

The Court: Would the income tax returns show it, the source of the income?

Mr. Cook: Yes, I think it would, yes, Your Honor. What salary he might have gotten from the landlord corporation, and if it is reported by the Club.

The Court: All right, I will hear Mr. Strong.

Mr. Strong: May it please Your Honor, this matter of discrimination, it was back in 1949 that the statute was first adopted, and it is here today. But I think that our Legislature was wise in 1949 in realizing that these prejudices and discriminations existed and infringed not in civil law, and not in criminal law. The Legislature realized that more than anything else what was needed was a process to eliminate, as is the whole philosophy of the Federal Government today in the Southern States. And through all these years every person in every city and state has thought that all this can be eliminated through educational means. That, Your Honor, is the very reason why the Legislature, in its wisdom, placed this whole tax administration, not under the department of law, but in the Commissioner of Education. The Commissioner of Education is a party defendant. Because they said the real secret, the real remedy, call it that, on our national economy, is ultimately through education.

With that philosophy in mind, the Legislature adopted this statute, and it limited, rather it specifies, details the Commissioner's duties and his powers. And may I say, Your Honor, parenthetically here, that a subpoena of this type can be issued only pursuant to statutory authority. That distinguishes it from

the Jersey City case Your Honor referred to, and to most of the cases cited by Mr. Cook.

The Court: How is it differentiated from the Jersey City case? From the Pennsylvania Railroad case? How is it differentiated from the tax assessing statutes?

Mr. Strong: I didn't have in mind the tax assessing statute. I had in mind what Your Honor said about the Schlossberg case. I spoke ultimately there was some effort—

The Court: Proceed.

Mr. Strong: The differentiation in the Pennsylvania Railroad case because that hasn't got the statutory provision that this case does.

The Court: The statutory provision says they had the right of subpoena. And this one says the same thing.

Mr. Strong: In any event we have to look at the statute, as the Keene case held, for determination of the—

The Court: That is a Jersey City case too, Mr. Strong.

Mr. Strong: Yes. What right the statute gives. Now, Your Honor must bear in mind that we have had no knowledge whatsoever of any complaint made before the Department of any discrimination. No opportunity to answer them, because we didn't know they even existed. When all of a sudden, out of the blue, we get this subpoena, with all these things we were supposed to accomplish. Now, the Commissioner admits, and the affidavit shows that so far as this matter has progressed, complaints have been filed. We have no reason to doubt it, but we just don't know. If he says so, why, all right. Then it says the Commissioner shall cause prompt investigation to be made in connection therewith, and if the Commissioner shall determine after such investigation probable cause exists for discrediting the allegations of the complaint, and what, if Your Honor please, has our action got to do with crediting the allegations of the complaint? Then, Your Honor, in line with the philosophy in which this statute was adopted, it says, after they determine that there is probable cause for crediting the allegations of the complaint, then the Commissioner shall attempt to eliminate the unlawful practice or unlawful discrimination, by conference, conciliation, and persuasion.

The Court: You see, Mr. Strong, I think that you are not differentiating between the two sections of the statute. The section of the statute as I appreciate the Department is proceeding under, is the investigatory section of the statute.

Mr. Strong: Yes, sir. That comes first.

The Court: That comes first, and I assume that the Legislature, in its wisdom, put it in the department of Education, so that there would not be any hue and cry of politics, or oppressions, or discrimination, and put it in this Department which is free from all of these things, and asked that department to make the investigation, and in that investigation they include the rights, as the statute so reads, to hold hearings, subpoena witnesses, compel their attendance, administer oaths, take the testimony of any person under oath, and in connection therewith require the production for examination any books or papers relating to any subject matter under investigation, or in question before the Commissioner.

Mr. Strong: I am agreeing with that entirely, Your Honor, but the first word in that section, Your Honor, reads, in case of failure so to eliminate, which means by conference and conciliation.

The Court: No. I was quoting from section 18:25-8. You are referring to section 18:25-15. So go to the prior section.

Mr. Cook: Your Honor, I think it is referring also to section 14, which has to do with investigation, and then comes section 15, with the public hearing.

Mr. Strong: I think it says here, Your Honor, sections 14 and 15, as I have it here.

The Court: Look at Section 8.

Mr. Strong: It describes the powers.

The Court: I said there were two phases. The investigatory, and then after that the procedural.

Mr. Strong: I submit the sections H and I, they are together, one after the other; I referring to the main two phases of the whole proceeding. The one is determining the probable cause of the complaint, and the conciliation and persuasion. First, I most respectfully submit, there must be this effort for constant persuasion and conciliation. There has been none of that. Then says the statute, in section 15, that if you can't eliminate it in that man-

ner, then the full investigation, and with that we have no quarrel. But we haven't reached that point yet. Your Honor, how do we know but what if we get a chance to talk this over in a friendly fashion, how do we know but what we might agree with the Commissioner? We don't know yet, because we don't know what they are saying about it. The first notice we got of anything here was the service of the subpoena. Counsel said that because we used the word "club" in the title of the Sun and Splash Club, that that means that we are operating as a private club. That, of course, is just not so, Your Honor, you can go along Route 22 and every five minutes you will see these different clubs along the highway, the bars and grills, with dancing, and serving food as well. Open to the public, but using the name "club."

But that isn't the point, Your Honor. The point here is that this Commissioner is enjoined by that statute, in the first instance, to confer, conciliate and persuade, and we are enjoined to meet with him for that purpose.

The Court: Assuming, Mr. Strong, that your client is a bonafide private club, assuming that, what right would the Commissioner have to conciliate and do anything with your client?

Mr. Strong: As I see it, that isn't the point.

The Court: Well, it is the point; you just said that, that it didn't give you an opportunity to conciliate with him and to work this matter out. How in the world could the Commissioner or the Deputy Commissioner, the Assistant Commissioner of Education, conciliate with you, unless he knew the facts?

Mr. Strong: In the first instance they didn't know the facts.

The Court: How can they find that out unless they have an investigation?

Mr. Strong: They say on the basis that there is. Counsel says these children say so. Then says the statute, confer, conciliate, persuade. Instead of which they bring this antagonistic attitude.

The Court: If your client feels that it is a bonafide club, they say, here is my record, here is everything we have, we show you we are a bonafide club, and the Commissioner, I am sure, would be the first to uphold that right.

Mr. Strong: It may be. But in 1952 this whole thing was examined by the Commissioner and found to be not any discrimination.

The Court: Was it found to be a private club?

Mr. Strong: I believe that was part of the finding, yes.

Mr. Cook: Your Honor, I don't think that is true. There were, as Mr. Strong said, a number of complaints against this so-called club previously, which never came to a public hearing. I think, off the record, some of the witnesses the Division was going to rely on, became unavailable, and nothing came of it.

The Court: In other words, there was no real investigation into the characteristics of this club?

Mr. Cook: There was some investigation. I don't believe that a subpoena was ever served at that time. But it was always maintained, and I don't know Mr. Strong could prove it, that he maintained January 17th, 1951, that we have a Sun and Splash Club, and it cannot be considered a place of public accommodation, and, therefore, there was nothing further to say with you people about it.

Mr. Strong: After that letter was written I personally attended a conciliation meeting in Trenton and raised that question, and the matter was dropped. We went down there with records and showed him. I personally was there.

The Court: Proceed, Mr. Strong.

Mr. Strong: But at any rate that was the way they proceeded then, Your Honor, and that is the way, I most respectfully submit, they should proceed today, with conciliation, conference, persuasion, and until they do that, a fair reading of the statute shows they have no right, or should not use the subpoena power. Certainly, sir, the two contrasts of the subpoena, and bringing in everything you have got, your personal papers, your business statements, everything you have got, bring that in and show us, is entirely antagonistic to the idea of persuasion and conciliation, which the statute says should be done first.

The Court: Have you rested?

Mr. Strong: Yes, sir.

The Court: Do you want to add anything further?

Mr. Cook: Just one remark, Your Honor. The statute, Section 14, as Your Honor has already

read, says if the Commissioner shall determine after such investigation that probable cause exists for complaint, he then shall conciliate.

The Court: Well, gentlemen, I have listened attentively to your arguments, which were most interesting, and as Mr. Strong has indicated, I was a member of the Legislature and probably voted for this, I think. I am fully familiar with the statute, and I re-acquainted myself with it again this morning, and I have read your briefs, and I have come to the conclusion that the plaintiff's complaint in lieu of prerogative writ should be dismissed, and that a summary judgment should be granted to the defendants.

I have come also to the conclusion that the Division against Discrimination, Department of Education, and John P. Milligan, Assistant Commissioner of Education, should have and exercise a right of subpoena, as provided by statute. I make one admonition, however, and I so order, that the Sun and Splash Club, a Corporation, Edgar L. Reed, comply with the subpoena; but I make one admonition, that I think that the Division against Discrimination of the Department of Education, and John P. Milligan, ought to pursue the matter cautiously. I think that maybe it would not be required that all of the things listed in the subpoena are necessary, and I do not think that the Sun and Splash Club, and Edgar L. Reed, ought to be unduly oppressed, or harrassed, and I see why the statute, and I so order, and I so determine that you have the right of subpoena, you have the right to get the information you need. But at the same time I merely offer some admonitory advice to the Division, and to Dr. Milligan, go slowly. Maybe just some of these things you will get enough information to determine whether or not there is probable cause for you to file your complaint, or proceed with the action against the Sun and Splash Club, and Edgar L. Reed; or you may come to the conclusion, without seeking all the documents that you want, that this is a bonafide private club, and that the complaints made against it were not bonafide, and no action should be taken against it. This is without costs.

Mr. Cook: Now, Your Honor, I just wanted to make one brief remark in answer to your observation: This subpoena was served upon Mr. Reed only after our investigator had approached him and asked him to make these records available, and Mr. Reed had refused. It was then he was served with the subpoena. We don't serve subpoenas until we have to.

Mr. Strong: In the affidavit I have not been advised of that at all.

The Court: It is not necessary at this time, Mr. Strong, but in my humble opinion, I think what Mr. Reed should do, and this Sun and Splash Club should do, should go down to Dr. Milligan and say, here, this is what we have, this is what we have to prove that we are a private club, and if they are a private club I am sure that this State agency would be the first to uphold that determination. But if they weren't a private club, they are not a private club, then I think that the State Agency has a duty, under the Statute, to ask them to terminate the discrimination.

Now, that is it, gentlemen.

Mr. Cook: Your Honor, may I say one more thing: In other words, the subpoena has issued then.

The Court: Is valid and binding.

Mr. Cook: But only use as much of it as is necessary.

The Court: That is what I said in effect.

Mr. Cook: Thank you very much.

PUBLIC ACCOMMODATIONS
Tort Liability—Louisiana

James EARLY et al. v. ETHYL EMPLOYEES' RECREATION ASSOCIATION

Court of Appeals of Louisiana, First Circuit, March 17, 1958, 101 So.2d 716

SUMMARY: Negro petitioners sued to recover damages for the death of their son who

drowned in the defendant's swimming pool, which was reserved for "whites only." Deceased was hired to clean up around the swimming pool, but apparently for one day only. On the following day he returned to the swimming pool and commenced work with another employee. The other employee testified that he heard a splash, assumed "that Early was 'sneaking a swim' " but had thought that there was no need for investigation because no one was supposed to be swimming at the time and "for the further reason that the pool was to be used for white persons and that Early, being a Negro boy was prohibited from swimming therein." The court held that there was no negligence on the part of the defendant, and that the Workmen's Compensation Act did not apply to the defendant's business.

LOTTINGER, Judge.

This is a suit in tort and, in the alternative, for benefits under the Louisiana Workmen's Compensation Act, LSA–R.S. 23:1021 et seq., for the death of the minor son of petitioners James Early and his wife, Mary Banks Early. The defendants are Ethyl Employees Recreation Association, its liability insurer, The Travelers Insurance Company, and its workmen's compensation insurer, United States Casualty Company. The Lower Court rejected the petitioners' demands against all defendants and dismissed the suit. The petitioners have appealed.

The record shows that Ethyl Employees Recreation Association, which will hereinafter be referred to as "ERA", is a non-profit corporation organized under the laws of the State of Louisiana. Its purpose is to provide wholesome recreation and entertainment for the employees of Ethyl Corporation in Baton Rouge. In connection with its purpose, it operates recreation facilities including a swimming pool. ERA has under its employ Hewitt Gomez, as Recreational Director, Robert Klein, as Center Attendant, as well as janitorial help. Mr. Klein is in charge of the janitors. The record shows that Ernest Thomas worked as janitor from Mondays through Saturdays of each week, and that on Sundays, which was Thomas' day off, Leroy Hayes assumed the duties in place of Thomas.

On September 8, 1956, the ERA held dedication ceremonies for its new swimming pool. As there was a large crowd expected, both Thomas and his helper Hayes were requested to come to work. As Hayes had prior commitments he was asked to secure a substitute. Hayes asked his friend, Roosevelt Early, to substitute for him on that day and Early accepted. Early and Thomas both put in a full day of work on Saturday, September 8, 1956. Roosevelt Early was paid the sum of $5 as his wages. Upon paying Early his wages, Mr. Klein told Thomas to check with Hayes to determine whether Hayes was coming to work the following day, and that if Hayes did not intend to work that Thomas should come to work on Sunday, which was his usual day off. No one asked Roosevelt Early to return on Sunday, and it was assumed that his substitute work was terminated.

[*Went to Work*]

On Sunday morning, however, Roosevelt Early did show up at the swimming pool to the surprise of Ernest Thomas. However, Thomas stated that he assumed that Early had been told to work on that day and so they entered the pool area together and commenced to clean up on the apron of the pool. Thomas left Early cleaning the apron and went to clean up the ladies' bath house. While he was in the bath house, he heard the door to the men's bath house close and shortly thereafter heard the door close again. A short time later Thomas testified that he heard a splash which sounded like someone diving into the pool. Thomas assumed that Early was "sneaking a swim" and did not investigate because no one was supposed to be swimming at that time as there were no life guards present, and for the further reason that the pool was to be used for white persons and that Early being a Negro boy was prohibited from swimming therein. Upon completing his cleaning details in the ladies' bath house, Thomas looked for Early in the men's bath house, and not finding him there commenced to search for him. Early's body was found under the diving board at the deep end of the pool. He was dressed in a lifeguard bathing suit.

Roosevelt Early was 17 years of age at the time of his death. His father and mother filed this suit in tort, and, in the alternative, for workmen's compensation. Upon trial of the matter, the testimony disclosed that Mary Banks was previously married to George Hayes, from whom

she was separated prior to the birth of Roosevelt Early. At the time of Roosevelt's birth, his mother was living with petitioner, James Early, and they testified that decedent was their child. James Early and Mary Early were married to each other after the death of their son and just a short time before trial. George Hayes and Mary Early were never divorced and the only information to his present whereabouts is the fact that someone told Mary Banks that he was dead just a few days before she married James Early. The issue has been raised as to the right of petitioners to bring this suit.

[*Res Ipsa Alleged*]

Of course, the tort claim by petitioners is based upon the negligence of the ERA. The petitioners raised the doctrine of res ipsa loquitur. No negligence whatsoever has been shown on the part of the defendants. The record shows that at the time Early was drowned, the pool was closed to swimming, as it was the rule of the ERA that no swimming would be allowed unless the life guards were present. Furthermore, on the day before his death, Thomas had told the deceased that the pool was exclusively for persons of the white race and that no Negroes were allowed to swim therein. The evidence shows that, although the deceased knew of the prohibition against his swimming in the pool, and knowing that no one was allowed to swim without the presence of life guards, he did enter the pool for the purpose of swimming. We feel that this is shown by the fact that he entered the men's bath house and put on a life guard's bathing suit. Furthermore, the duties assigned the deceased by Thomas was the cleaning of the mat where the stage had been located for the preceding day's dedicatory ceremonies. This mat was located on the shallow end of the pool. At the time the deceased's body was discovered, it was located under the diving boards at the deep end of the pool. The pool is some 100 feet in length. Had the deceased fallen into the pool as is claimed by petitioners, it seems as though he would have fallen in the shallow end of the pool where he was supposed to be working.

The petitioners claim foul play because of the fact that there was a brush burn found on the forehead of Early's body. We feel that the record shows that this brush burn must have occurred when the deceased attempted to dive into the pool. Thomas testified that no one was present except himself and the deceased on that morning. He also testified that the deceased had criticized some of the divers during the preceding day's ceremony and made the statement that he could have done better.

We feel that the record shows that the deceased entered the men's bath house, took off his street clothes, and dressed himself in one of the life guard's bathing suits and then returned to the pool for the purpose of swimming. It appears that he must have dove off the diving board and probably struck his head on the bottom of the pool. Although there was some testimony to the fact that the deceased was scared of water and never went swimming, it appears from his conversations with Thomas that he must have been interested in taking a swim.

[*Doctrine Not Applicable*]

We do not feel that the doctrine of res ipsa loquitur would apply to the factual situation of this case.

In Rome v. London & Lancashire Indemnity Co. of America, La.App., 169 So. 132, 141, the Court considered a tort action based upon the death of a 10 year old boy. In that case life guards were present at the time of the boy's drowning, however they did not know anything of the drowning until they found his body at the bottom of the pool after the pool had been closed. The Court applied the doctrine of res ipsa loquitur in that case. However, the Court said:

> "A presumption of fault, on the part of the owner, does not arise merely because a person is drowned in his swimming pool. But where a person is drowned in a pool policed by life guards supplied by the owner under a contract with the deceased, and those guards have failed to see the drowned person in distress, either because of the fact that the pool was overcrowded, or because they were not alert and vigilant in the exercise of their duties, then, in such case, it will be presumed that if the life guards had been attending to their task, they would have discovered the peril in time to rescue the life."

The facts, however, in that case are clear, because there the boy was a paid customer of the pool, he had a perfect right to be there, and there were two life guards on duty at the time

of his drowning. The situation in this case is altogether different. Furthermore, in the very recent case of Larkin v. State Farm Mutual Automobile Insurance Co., 233 La. 544, 97 So.2d 389, 391, the Supreme Court stated as follows:

> "All that is meant by res ipsa loquitur is 'that the circumstances involved in or connected with an accident are of such an unusual character as to justify, in the absence of other evidence bearing on the subject, the inference that the accident was due to the negligence of the one having control of the thing which caused the injury. This inference is not drawn merely because the thing speaks for itself, but because all of the circumstances surrounding the accident are of such a character that, unless an explanation can be given, the only fair and reasonable conclusion is that the accident was due to some omission of the defendant's duty.'
>
> "• • • It is the duty of the plaintiff to prove negligence affirmatively; and, while the inference allowed by the rule of res ipsa loquitur constitutes such proof, it is only where the circumstances leave no room for a different presumption that the rule applies. When it is shown that the accident may have happened as the result of one of two causes, the reason for the rule fails and it cannot be invoked."

Under the jurisprudence of this State, we do not believe that the doctrine is applicable to the facts of this case. We do not think that the death of Roosevelt Early can be imputable to the negligence or omission of the defendant under the facts shown. Although we are not favored with a written opinion of the Lower Court, it obviously felt the same way, as the case was dismissed below.

[*Urge Tort Doctrine*]

The petitioners, although they claim workmen's compensation in the alternative, very strongly urge that the tort action should prevail and in their brief state that this case comes under tort for two reasons—first, defendant's business is not classified as hazardous, and, secondly, that the father of the deceased minor had not elected for him to come under the provisions of the Louisiana Workmen's Compensation Act. As to their first contention, we believe that they are correct, however, as to the second contention, it is a presumption that a minor under the age of 18 shall come under the Compensation Act unless there is an express rejection of the Act by the minor's parents. Bourgeois v. J. W. Crawford Construction Company, 213 La. 992, 36 So.2d 13.

As to the claim in workmen's compensation, we also feel that the Lower Court was correct in dismissing same. No one in authority with ERA had hired the deceased to work on the day of his death. The only person who knew of his presence at the swimming pool was the janitor, Ernest Thomas, and the record clearly shows that the janitor did not have the authority to hire employees. The record shows that no wages were paid the parents of the deceased for the work that he performed on the day of his death. Furthermore, assuming that the deceased was an employee of ERA at the time of his death, we have been unable to find any cases which have held that a swimming pool is hazardous under the provisions of the Louisiana Compensation Act. In the petitioner's brief, we find a statement that defendant's business is not classified as hazardous. Of course, under the law of our state if the business is not hazardous it is not covered by the Compensation Act.

The record indicates to us that at the time of his death Roosevelt Early was sneaking a swim, contrary to the restrictions of ERA. He had full knowledge that swimming at the time was prohibited, and that the pool was reserved strictly for persons of the white race. We have found no evidence in the record which would disclose any negligence on the part of the ERA so as to make them liable in tort. Furthermore, the record further discloses that Roosevelt Early was not employed by ERA at the time of his death, so as to make them liable in workmen's compensation. If he was employed, the business of ERA cannot be classified as hazardous. The record fails to disclose that same was hazardous.

Under the above holdings it is not necessary for us to consider the rights of petitioners to maintain this action. The Lower Court was correct in dismissing the suit, and the judgment of said Court will be affirmed.

For the reasons assigned, the judgment of the Lower Court is affirmed, all costs to be paid by petitioners.

Judgment affirmed.

PUBLIC GATHERINGS

Interracial—Virginia

COUNTY OF ARLINGTON v. Mildred Brent ELDRIDGE

Arlington, Virginia, County Court, June 9, 1958, Case No. B-37926.

SUMMARY: Defendant, a Negro, was charged with disorderly conduct while attending a picnic with white persons. The court found the defendant not guilty, since she was seated with persons of her own Unitarian church who did not object to her presence. This conduct was found not "reasonably calculated to create a breach of the public order or cause consternation, alarm or terror to the people of the community," as required by the county's disorderly conduct ordinance.

ORDER

BROWN, Judge:

THIS is not a segregation case. As the Supreme Court of Appeals of Virginia held in Taylor v. Commonwealth, 187 Va. 214, which involved a disorderly conduct charge in failure of the defendant there to change her seat on a bus, it is ". . . an offense, arising from personal misconduct and misbehavior as distinguished from an offense arising out of the violation of a segregation statute."

THE subject ordinance prohibits conduct ". . . as may reasonably be calculated to create a breach of the public order or cause consternation, alarm or terror to the people of the community."

IN the present case, as in the Taylor case, there was ". . . no definite misbehavior or misconduct in the sense that she was disorderly or turbulent." The defendant here was seated with persons of her own Unitarian Church, present under a permit, and who did not object to her presence. The evidence shows that none of the few persons present objected or that there was consternation among them. This is distinguishable from situations where a police officer observes signs of tension and of consternation among those present. Officers do have a duty to act to prevent incipient riot. It is particularly true of the offense of disorderly conduct that each case must be heard and decided on its own merits.

ACCORDINGLY, the defendant is found not guilty and the cash bond in the amount of Fourteen Dollars Twenty-five Cents ($14.25) heretofore posted on June 1, 1958 by "Unitarian Church of Arlington," on receipt form No. 3381, is ordered refunded to the payor.

ENTERED this 9th day of June, 1958.

TRANSPORTATION

Buses—Arkansas

CITIZENS COACH COMPANY v. Mrs. Freeda WRIGHT.

Supreme Court of Arkansas, May 5, 1958, 313 So.2d 94.

SUMMARY: Plaintiff brought action against a fellow passenger and a bus company for injuries alleged to have been sustained in an altercation aboard the bus following a dispute

over seating. (Press dispatches at the time indicated that plaintiff was a white woman, the defendant fellow passenger a Negro woman, and the incident occurred shortly after desegregation of Little Rock buses). She was awarded actual damages of $500 and punitive damages of $1000 against her fellow passenger and actual damages of $5,000 against the bus company. The company appealed on the ground that the verdict against it was excessive. The Arkansas Supreme Court reversed this judgment and remanded the case with directions to enter judgment for $500 instead of $5,000, since actual damages against the bus company should not exceed actual damages against the fellow passenger. The bus company's liability is based upon its servant's failure to protect the plaintiff from the assault by the other passenger, the court said.

McFADDIN, Justice.

The appellant, Citizens Coach Company (hereinafter called "Coach Company") is a corporation engaged as a common carrier in operating a transportation system in the City of Little Rock. The appellee, Mrs. Freeda Wright, while a passenger on a bus of appellant, was assaulted by another passenger named Dorothy Payne. Mrs. Wright filed this action for damages against Dorothy Payne, for assault and battery, and against the Coach Company for its failure to accord Mrs. Wright the degree of safety and protection to which a passenger is entitled from a common carrier.

A jury trial resulted in these verdicts for Mrs. Wright for which judgments were entered: (a) against Dorothy Payne for actual damages of $500; (b) against Dorothy Payne for punitive damages of $1,000; (c) against Citizens Coach Company for actual [1] damages of $5,000. The Coach Company is the only appellant and there is no cross appeal; so the only question before us is the correctness of the judgment for actual damages of $5,000 against the Coach Company. Among others, these points, now to be discussed, are presented by the Coach Company.

I. *Sufficiency Of The Evidence.* The Coach Company claims that the evidence is insufficient to sustain *any verdict* against it in favor of Mrs. Wright. Viewing the evidence in the light most favorable to the verdict, as is our rule in cases like this one,[2] it appears that Mrs. Wright and Dorothy Payne were both passengers on one of the appellant's buses. Some question arose as to seats. Dorothy Payne called Mrs. Wright several ugly names; then later kicked Mrs. Wright, shoved her backwards, and otherwise assaulted her. Mrs. Wright testified that once while the cursing was taking place, and prior to the actual physical assault, the bus driver looked at the parties but did nothing further, and that it was several minutes later before the actual physical attack occurred. Here is Mrs. Wright's testimony as to the inaction of the bus driver:

> "Once when she was cursing me, he (bus driver) turned his head halfway around because I was expecting him to say something to her then, but he didn't. He never moved from his seat or never said a word, but he did turn halfway around once and that is when I thought he was going to stop her."

We have a number of cases stating the duty of the carrier to protect a passenger from assault or injury from other passengers. One such case is Hines v. Rice, 142 Ark. 159, 218 S.W. 851, and in that case our earlier cases are cited. The case of Arkansas Power & Light Co. v. Steinheil, 190 Ark. 470, 80 S.W.2d 921, 923, involved a street railway as a common carrier. There a passenger brought an action against the carrier for damages because of injuries received from another passenger; and, in stating the duty of the carrier, Justice Frank G. Smith said:

> "Appellee quotes from the chapter on Carriers in 4 R.C.L., § § 606, 607, and 608, as correctly declaring the law applicable [3]

1. The Trial Court did not submit to the jury any question of punitive damages against the Coach Company, and there is no complaint about such failure.
2. See Life & Casualty Ins. Co. v. Kinney, 206 Ark. 804, 177 S.W.2d 768; Rexer v. Carter, 208 Ark. 342, 186 S.W.2d 147; and Arkansas Power & Light Co. v. Connelly, 185 Ark. 693, 49 S.W.2d 387.
3. While the text in Am.Jur. is not identical with that in R.C.L., nevertheless the same general rules appear in 10 Am.Jur. "Carriers" §§ 1439, 1440, and 1441.

to the facts of this case; and we concur in that view. It was there said that a carrier owes to its passengers the duty of protection from the violence and insults of other passengers or strangers, so far as this can be done by the exercise of a high degree of care, and will be held responsible for its own or its servants' negligence in this particular when, by the exercise of proper care, the act of violence might have been foreseen and prevented. That the negligence for which, in case of an injury to as passenger by a fellow passenger or a stranger, the carrier is held liable, is not the tort of the fellow passenger or stranger, since there is no such privity between the carrier and such tortfeasors as to make the carrier liable, on the principle of *respondeat superior;* but it is the negligent omission of the carrier, through its servants, to prevent the tort from being committed which renders the carrier responsible. That the negligent failure of the servants of a carrier to prevent the commission of the tort being the basis of the action, it follows that for this omission or failure to be actionable negligence, there must be a failure or omission to do something which should have been done by the servant, and there is, therefore, involved the essential ingredient that the servant had knowledge, or with proper care could have had knowledge, that the tort was imminent, and that he had that knowledge, or had the opportunity to acquire it, sufficiently long in advance of its infliction to have prevented it with the force at his command; * * *."

In the Steinheil case, it was held that the carrier was not liable because the injuries had already been sustained by the passenger before the carrier's servant learned or could have learned of the affray. But in the case at bar there is evidence, as previously stated, from which the jury could well have concluded—as it apparently did—that after the bus driver saw and heard the disturbance he did nothing to protect Mrs. Wright from the assault and battery subsequently afflicted on her by Dorothy Payne. Therefore, because of the testimony previously recited, and other in the record, we conclude that the evidence was sufficient to take the case to the jury and to support a verdict for some amount.

II. *The Coach Company's Request For Judgment Non Obstante Veredicto.* In this assignment the Coach Company says: *"The verdict against the Citizens Coach Company, particularly insofar as it exceeds the amount assessed against Dorothy Payne for actual damages, is a mistake which should be corrected".*

As heretofore mentioned, the jury rendered these verdicts: "We, the jury, find in favor of the plaintiff against Citizens Coach Company and assess her damages as follows: Actual Damages $5,000.00." "We, the jury, find in favor of the plaintiff against Dorothy Mae Payne and assess her damages as follows: Actual Damages, $500.00; Punitive Damages, $1,000.00; Total, $1,500.00." The Coach Company moved that the judgment against it be for $500 actual damages *non obstante veredicto.* The Court refused the motion; and that is the assignment that we now consider.

[*Amount of Judgment*]

A considerable portion of the brief of the appellant is devoted to the argument, that where separate verdicts are rendered against joint tortfeasors, the Court must enter judgment for the lower verdict. Appellant discusses in detail the old cases of Spears v. McKinnon, 168 Ark. 357, 270 S.W. 524; Wear-U-Well Shoe Co. v. Armstrong, 176 Ark. 592, 3 S.W.2d 698; and Southwestern Gas & Electric Co. v. Godfrey, 178 Ark. 103, 10 S.W.2d 894. Appellee says that the rule of these cases is changed by Act 315 of 1941, which is the Uniform Contribution Among Tortfeasors Act (§ 34-1001 et seq. Ark. Stats.); and appellee says that our case of Shultz v. Young, 205 Ark. 533, 169 S.W.2d 648, allows apportionment of judgments against joint tortfeasors.

Appellant cites and discusses our case of Little v. Miles, 213 Ark. 725, 212 S.W.2d 935, in which we held that the smallest verdict against any of the joint tortfeasors must be entered as the judgment against the others. Appellee counters that case by calling attention to Act 35 of 1949, which it is claimed was enacted [4] to overcome the effect of our holding in Little v. Miles.

We find it unnecessary to decide as between arguments on the point as just mentioned. Assuming that the purpose of the 1949 Act was

4. In this connection, see the discussion on Act 35 of 1949 as found in 3 Ark. Law Review, page 371.

to allow full apportionment among joint tortfeasors, and assuming that Dorothy Payne and the Coach Company are joint tortfeasors in the case at bar, nevertheless, we reach the conclusion that the verdict against the Coach Company is grossly excessive, when considered in the light of the fact that the verdict against Dorothy Payne was for only $500 actual damages. The defendant, Dorothy Payne, was a malfeasor,[5] and the Coach Company was a nonfeasor.[6]

[*Failed To Afford Protection*]

As pointed out in Section I of this opinion, the Coach Company, as a common carrier, was liable for failure, after reasonable notice, to protect Mrs. Wright from damage inflicted on her by Dorothy Payne. The verdict finds that the Coach Company failed to afford such protection. Because of such failure (nonfeasance) the Coach Company is liable for whatever damages Dorothy Payne inflicted on Mrs. Wright. Dorothy Payne committed an assault and battery (malfeasance) on Mrs. Wright, which might not have occurred if the Coach Company had not been guilty of nonfeasance. It is impossible for us to see how the failure of the Coach Company to protect Mrs. Wright could have caused more damage to Mrs. Wright than the actual damage[7] that Dorothy Payne inflicted on Mrs. Wright. The jury found that the actual damages inflicted on Mrs. Wright by Dorothy Payne amounted to $500, and against that verdict there has been no appeal. We cannot see how the actual damages against the Coach Company (the nonfeasor) can possibly exceed the actual damages against the malfeasor.[8]

5. Black's Law Dictionary defines malfeasance as "• • • the commission of some act which is positively unlawful; the doing of an act which is wholly wrongful and unlawful. • • •"
6. Black's Law Dictionary defines nonfeasance as "Nonperformance of some act which ought to be performed; omission to perform a required duty. • •"
7. No punitive damages were returned against the Coach Company; so we do not consider that issue. Of course, if the punitive damages had been assessed against the Coach Company, then a different situation might be presented.
8. There is a line of cases in Arkansas which holds that the corporation may be liable for damages even when its employee is absolved; but these cases are based on the distinction between contributory negligence and comparative negligence; and nothing in the present opinion affects in any way the holding in such cases as Missouri Pac. R. Co. v. Morrison, 186 Ark. 689, 55 S.W.2d 933; and Mississippi River Fuel Corporation v. Senn, 184 Ark. 554, 43 S.W.2d 255.

In cases of derivative liability many States hold that the finding of nonnegligence against the principal actor is a protection against the person sought to be held derivatively liable.[9] Our own case of Patterson v. Risher, 143 Ark. 376, 221 S.W. 468, looks in that direction. See also Annotation in 141 A.L.R. 1168; and see 52 Am. Jur. "Torts", § 125. While the liability of the Coach Company in the case at bar is not *derivative,* still it somewhat resembles derivative liability because the Coach Company was guilty of nonfeasance in failing to exercise due care to protect a passenger from the malfeasance (assault) committed by another passenger; and there is no reason for assessing actual damages for nonfeasance greater than the actual damages assessed for the resulting malfeasance. See 52 Am.Jur. "Torts" § 125. The verdict against the malfeasor for actual damages was $500; and the verdict against the Coach Company for any amount greater than $500 is grossly excessive and should be reduced to the amount of the actual damages committed by the malfeasor.

III. *Trial Court's Ruling On The Admission Of Evidence.* There is an assignment made by the appellant which we now mention in order to clearly indicate that we are not ruling on the point; and it relates to the admission of certain evidence. Mrs. Wright did not see fit to call any doctor in order to establish the nature and extent of her injuries. Instead, she offered in evidence the reports of the Arkansas Baptist Hospital. She claimed that under Act 293 of 1949 these reports were admissible to establish the nature and extent of her injuries. The appellant objected to these reports, contending that Act 293 of 1949 does not allow medical symptoms and maladies to be shown by nurses' reports on hospital records;[10] and in arguing the point here appellant cites, *inter alia,* the following cases: Shearman Concrete Pipe Co. v. Wooldridge, 218 Ark. 16, 234 S.W.2d 382; and National Life & Accident Ins. Co. v. Threlkeld, 189 Ark. 165, 70 S.W.2d 851.

We have grave doubts as to the correctness of the ruling of the Trial Court on the point here at issue. But it is not necessary for us to decide the question because appellant has stated

9. In Davis v. Perryman, 225 Ark. 963, 286 S.W.2d 844, our opinion was based on *res judicata* rather than on the theory of derivative liability.
10. See 3 Ark.Law Review 359 for discussion of this Act No. 293.

that if it prevails on the second point (that is, judgment *non obstante veredicto)* then appellant is willing to forego this assignment. Therefore, since we have sustained the appellant on the *non obstante veredicto* point, it becomes unnecessary to decide the question as to the admission of the evidence.

CONCLUSION

The judgment against the Citizens Coach Company for $5,000 is reversed and the cause is remanded with directions that the Trial Court set aside its judgment against the Coach Company for $5,000 and enter the judgment against the Coach Company for $500 as actual damages. All costs of the Trial Court are assessed against the Coach Company: all costs of the appeal are assessed against the appellee.

MILLWEE and ROBINSON, JJ., would affirm the judgment in its entirety.

GEORGE ROSE SMITH, J., not participating.

ON MOTION TO CLARIFY OPINION PER CURIAM.

Appellant's motion to clarify the opinion is denied. Even though appellant's motion may be premature, nevertheless we point out that the judgments are several, and under the facts in this case the appellant will not be entitled to any judgment over against Dorothy Payne.

TRANSPORTATION
Buses—Florida

Helen H. BULLOCK and Grover C. Bullock v. TAMIAMI TRAIL TOURS, INC.

United States District Court, Northern District, Tallahassee Div., Florida, May 28, 1958, 162 F. Supp. 203.

SUMMARY: A Negro minister and his white wife, British subjects residing in Jamaica, sued a bus company for damages sustained as a result of an assault upon them by another passenger. They contended their position in the front of the bus caused the assault and that the bus company, having knowledge of the attitude of the South toward integration, should have taken precautions to protect passengers from such assaults. The court held that under Florida law a carrier is not liable to a passenger for an unprovoked and illegal assault and that the evidence with regard to integration of transportation facilities refuted the plaintiffs' claim that unprovoked assaults should have been foreseen.

DeVANE, District Judge

This is a suit brought by plaintiffs who were passengers on one of defendant's busses for damages sustained as the result of an assault upon them by another passenger riding on the same bus. Plaintiffs claim that the assault was inflicted upon them because of the position they occupied on the bus.

The evidence in the case in the main is not in dispute. The evidence shows that plaintiffs are British subjects, residing on the island of Jamaica where they were both born and reared. They are married to each other and are both musicians and teachers. The husband is also a minister of the Church of England. The husband is colored and the wife is white. They were on their first trip to the United States.

[*Knew About Segregation*]

Reverend Bullock testified that he knew about segregation having been practiced in the Southern part of the United States, but that he had read in statements in a newspaper published in Kingston, Jamaica, that it had been abolished by a decision of the Supreme Court of the United

States and by an order of the Interstate Commence Commission, that he accepted these statements as true and relied upon them.

Reverend Bullock testified further that he made arrangements at Martin's Travel Agency in Kingston Jamaica for transportation for their visit to the United States. They were advised, so he testified, to travel by bus in order to see more of the country-side. Taking this advice, they purchased from the Agency airline tickets to Miami, Florida, and bus tickets from that point to New York by way of Kansas City, Missouri.

Upon boarding defendant's bus at Miami, the Bullocks seated themselves toward the front of the bus on the driver's side. When the bus reached its first stop at Coral Gables, about twenty miles outside of Miami, another passenger complained of the position Reverend Bullock occupied in the bus and the bus driver informed him of the complaint and asked him to move to the rear of the bus. This Reverend Bullock declined to do. Upon his declination the bus driver examined his tickets and announced to the passengers on the bus that he was unable to make Bullock move to the rear of the bus and they retained their seats until the incident that occurred at Perry, Florida, which resulted in this suit, took place.

[*Stop at Restaurant*]

The bus stopped at Pouncy's Restaurant, customarily used as a bus stop in that town after midnight. It was some time between two and three o'clock A.M. when the bus stopped at the restaurant. The bus driver, along with many of the passengers, went into the restaurant for a cup of coffee and while in there he told another bus driver or someone else of the presence in his bus of the Bullocks occupying seats well up in front of the bus and that they had declined to move to the rear of the bus.

Milton Poppell was in the restaurant at that time and overheard the conversation the bus driver had with the other person. There is some conflict in the evidence as to whether the bus driver was talking to another bus driver, to a policeman or to a third party, but the conflict is of no importance because the undisputed testimony shows that the bus driver had no conversation whatever with Poppell and did not even know him, or that he had overheard the bus driver's conversation with the third party.

While the bus was loading again Poppell purchased a ticket from the bus driver from Perry to Lamont, boarded the bus, demanded that the Bullocks move to the rear of the bus, and when they refused, assaulted Reverend Bullock, inflicting some damage to his face and body, and slapped Mrs. Bullock. The testimony is in dispute as to whether the bus driver was in the bus at the time of the assault. He says he was. Other testimony was to the contrary, but be that as it may, the bus driver called the police and the police arrested both Poppell and Reverend Bullock and demanded a $25.00 bond from each and directed the Bullocks to take a seat in the rear of the bus, which they did.

[*Evidence of Damage*]

There is considerable testimony in the record as to the extent of the damage inflicted upon Bullock and as to the effect on Mrs. Bullock of the slap administered to her by Poppell, but due to the disposition this Court is required to make of this case under Florida law, it is not necessary to review this testimony.

The evidence in the case clearly discloses an unprovoked and illegal assault by Poppell upon the Bullocks. The question presented is whether the bus company is liable to the Bullocks for this illegal and unprovoked assault by another passenger. The law in many jurisdictions in this country is in conflict on this question. The Supreme Court of Florida in a very able opinion has settled the law in this state.

In Hall v. Seaboard Airline Railway Co. 93 So. 151, the Florida Supreme Court held that a carrier was not liable to a passenger for an unprovoked and illegal assault in cases such as this case. Without regard to the views of this Court as to what the law should be in such a case as this the decision of this Court is completely controlled by the decision of the Supreme Court of Florida in the case cited above. Erie Railroad Company v. Tompkins, 304 U.S. 64.

Plaintiffs try to take this case out of the law established in the decision of the Supreme Court of Florida cited above by arguing that because of the attitude of the South towards integration carriers of passengers should anticipate assaults and adopt measures to protect passengers therefrom.

[*Effect of Evidence*]

The evidence in the case completely refutes the contention of plaintiffs in this regard. Integration in transportation has now been in effect in Florida and elsewhere in the South for approximately four years and the undisputed evidence in this case is to the effect that insofar as the carriers, both railway and bus transportation, are concerned, this is the only case in which an unprovoked assault of this nature has occurred. In fact, the evidence in this case commends highly the attitude of the public, both colored and white, as to the matter of integration in transportation facilities. The colored people, by an overwhelming majority, prefer to be segregated and voluntarily segregate themselves on public transportation. The testimony is that it is a rare occasion when a colored person, riding on public transportation, insists upon the right to sit among white passengers, but where such right is asserted, no violence, except in this case, has ever occurred in this state or any of its adjoining states.

In conformity with the opinion of the Supreme Court of Florida cited above, this Court finds and holds that plaintiffs shall take nothing by this suit and that the defendant may go hence without day. An appropriate judgment in conformity with this Memorandum Decision will be entered herein.

Dated this 28th day of May, 1958.

TRANSPORTATION
Buses—Tennessee

O. Z. EVERS et al. v. John T. DWYER et al.

United States District Court, Western District, Tennessee, June 27, 1958, Civ. No. 2903.

SUMMARY: A Memphis, Tennessee, Negro brought a class suit in a federal district court seeking a declaratory judgment and injunction restraining the city officials and the street railway company from enforcing a Tennessee law requiring racial separation on the buses. A three-judge court was convened to decide the constitutionality of the statute. The court found that there was no actual controversy since plaintiff had boarded the bus for the purpose of instituting a test suit and that he had not suffered irreparable damage necessary to justify the issuance of an injunction. The action was dismissed and the declaratory judgment and injunction were denied.

Before MARTIN, Circuit Judge; BOYD and WILLIAM E. MILLER, District Judges.

PER CURIAM.

This is a civil action brought by O. Z. Evers, a colored citizen, against the Mayor and Commissioners of the City of Memphis, individually and in their official capacities; the Chief of Police of Memphis, both individually and officially; two police officers of Memphis; a named employee of the Memphis Street Railway Company, operator of one of its buses; and the "Memphis Street and Railway Company". The complaint is based upon the alleged violation of the rights of plaintiff and other citizens similarly situated, as guaranteed by the Fourteenth Amendment of the Constitution of the United States, in the enforcement by defendants of Sections 1704-1709, Title 65, Tennessee Code Annotated, 1955, requiring the separation of white and colored persons on street-car lines operated in Tennessee.

The charge is made that the aforementioned Tennessee Code sections are unconstitutional, in view of the decision of the Supreme Court of the United States in Gayle v. Browder, 352 U.S. 903, affirming the decision of a three-judge district court sitting in the Middle District of Alabama in 1956 (reported in 142 F.Supp. 707), generally known as the "Montgomery Bus Case".

The plaintiff insists that the doctrine of Plessy v. Ferguson, 163 U.S. 567, has been entirely repudiated by the holding and pronouncements of the highest court in Brown v. Board of Education, 347 U.S. 483; Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877; and Holmes v. Atlanta, 350 U.S. 879.

Plaintiff avers that, on April 26, 1956, he was ordered by the bus operator to move from a front seat which he occupied to the rear of the bus. He refused and, later, two Memphis Police officers who, apparently, had been summoned by the bus operator, ordered him to obey, get off the bus, or be arrested. Whereupon, he left the car. He pleads that he and those similarly situated are threatened with irreparable injury by reason of the acts of defendants of which complaint is made, and that there is no other plain, adequate and complete remedy other than by "this suit for an injunction."

[*Three-Judge Court Asked*]

The prayer of the complaint asks that a three-judge court, as provided for by Title 28, section 2284, United States Code, be convened; that an injunction restraining defendants from enforcing the sections of the Tennessee Code cited above be granted; and that defendants be restrained from enforcing "any and all customs, practices, and usages pursuant to which plaintiff or other persons similarly situated are segregated in the street cars of the Memphis Street and Railway Company, on the ground that such statutes are null and void and in violation of the Fourteenth Amendment to the Constitution of the United States." Declaratory judgment, pursuant to sections 2201 and 2202 of Title 28, United States Code, declaring and defining "the legal rights of the parties in relation to the subject matter of this controversy" is prayed.

Separate answers of the Mayor and City Commissioners of Memphis, of the Memphis Street Railway Company and its bus operator, and of two substituted police officers for those officers named in the petition (who had nothing to do with the matter) were filed; a three-judge court was lawfully designated; and the case came on for hearing before that court on January 6, 1958.

Immediately prior to the hearing, the defendants filed a motion for continuance on the ground that the five-day notice required by statute [28 U.S.C., section 2284] had not been given by the Clerk of the Court to the Governor and the Attorney General of Tennessee. At the hearing, it was insisted that the assembled three-judge court had no jurisdiction to proceed. Technically, there was merit in this position; but, inasmuch as the pendency of the suit and of the date set for hearing was a matter of common knowledge and must have been known by the State officials, the court deemed it inadvisable to delay action beyond a time sufficient to permit the State of Tennessee to intervene. It was ordered, therefore, that the hearing proceed, that evidence be introduced and recorded and arguments heard, with the understanding that after appropriate notice had been given the Governor and the Attorney General of Tennessee the State could intervene and be heard; or, if the State so elected, all evidence received at the January 6 hearing should be expunged and the proceeding started *de novo*. This course was pursued by the court for the added reason that the counsel who took the lead for plaintiff had traveled from New York to attend the hearing and all parties except the State were represented by counsel in attendance. The further hearing was set for January 11 to afford opportunity for compliance with the provision of the statute requiring five days notice.

[*No State Proof*]

On January 11, 1958, the Solicitor General and the Assistant Attorney General of Tennessee appeared on behalf of the State and adopted all defenses made by the defendant officials of Memphis. When offered the opportunity, they expressed no desire to present additional proof, but did file briefs. Indeed, the second point made in the State's brief is, we think, determinative of the present case: that is to say that this action should be dismissed for lack of an actual controversy and of a real interest in the suit on the part of the plaintiff. The Federal Declaratory Judgment Act provides: "In a case of *actual controversy* within its jurisdiction, except with respect to Federal Taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations *of any interested party* seeking such declaration, whether or not future relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be review-

able as such." [Emphasis supplied] Title 28, section 2201, U.S.C.

In Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 272, 273, the Supreme Court asserted that a district court is without power to grant declaratory relief unless an actual controversy exists. The Supreme Court said, further, that the difference between an abstract question and a controversy contemplated by the Declaratory Judgment Act is necessarily one of degree; that it would be difficult—if possible—to fashion a precise test; and that the question in each case is basically whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

[*Actual Controversy Vital*]

The Court of Appeals for the Sixth Circuit, speaking through Judge Shackelford Miller, Jr., in Walker v. Felmont Oil Corporation, 240 F.2d. 912, 916 (C.C.A. 6), said: "Although jurisdiction may exist, it does not follow that it must be exercised. The Declaratory Judgment Act confers a discretion on the court rather than an absolute right upon the litigant. Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237, 241, 243, 73 S.Ct. 236, 97 L.Ed. 291; Brillhart v. Excess Insurance Co., 316 U.S. 491, 494, 62 S.Ct. 1173, 86 L.Ed. 1620; Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407. Federal courts should exercise their discretionary power with the proper regard for the rightful independence of state governments in carrying out their domestic policy. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of lower federal courts. Commonwealth of Pennsylvania v. Williams, 294 U.S. 176, 185, 55 S.Ct. 380, 79 L.Ed. 841; Burford v. Sun Oil Co., 319 U.S. 315, 318, 334, 63 S.Ct. 1098, 87 L.Ed. 1424. A federal court in a declaratory judgment suit should give strong consideration to the public interest involved in the avoidance of needless friction with state policies. Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 500, 61 S.Ct. 643, 85 L.Ed. 971; Alabama Public Service Commission v. Southern Railway Co., 341 U.S. 341, 350, 71 S.Ct. 762, 95 I.Ed. 1002."

Moreover, the Court of Appeals for this Circuit, in an opinion by Judge Potter Stewart, states: "******* It is well settled, however, that accepted principles governing equitable and declaratory relief are no less applicable where such relief is sought under the Civil Rights Act. Giles v. Harris, 1903, 189 U.S. 475, 486, 23 S.Ct. 639, 47 L.Ed. 909; Douglas v. City of Jeannette, 1943, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324. Federal courts have been chary of granting declaratory or equitable relief in an area of possible friction between federal and state jurisdictions. [Citing cases]." Williams, et al. v. Dalton, et al. 231 F.2d. 646, 648 (C.C.A. 6).

[*Immediate Danger Spot*]

The Court of Appeals for the Seventh Circuit, in Ex-Cell-O Corporation v. City of Chicago, 115 F.2d 627, held that a party attacking the validity of a municipal ordinance had failed to meet the required standard of showing, not only that the ordinance was invalid, but also that he had sustained or was in immediate danger of sustaining some direct injury as the result of its enforcement; not merely that he had suffered in some indefinite way in common with people generally. The court quoted from the opinion of the Supreme Court in Massachusetts v. Mellon, 262 U.S. 447. See also Federation of Labor v. McAdory, 325 U.S. 450, 463, where it was said: "Only those to whom a statute applies and who are adversely affected by it can draw in question its constitutional validity in a declaratory judgment proceeding."

In the absence of a clear showing of an actual controversy and that he is genuinely being deprived of a constitutional right, no citizen should be privileged to obtain from a federal court a judgment which not only declares invalid the statutory law of a sovereign state, but also enjoins its enforcement.

In the instant case, the plaintiff, a colored postal clerk who had previously been a police officer in Cook County, Illinois, recently came to Memphis where he worked in the Post Office. On April 26, 1956, he boarded a Memphis Street Railway bus and took a front seat immediately behind the driver, who directed him to sit in the rear of the bus, stating that the law required it because of plaintiff's color. He refused to comply. The bus driver proceeded to a fire station, which be entered and where he remained for some ten minutes according to the

plaintiff. When the bus reached another corner on its route, two police officers boarded the bus and asked what was wrong. The driver told them that the plaintiff and another man accompanying him had refused to move to the rear. The officers ordered plaintiff to go to the back of the bus, get off, or be arrested. He left the bus.

[*Rode in Automobile*]

Plaintiff testified that he was coming down town to the Post Office and had ridden in an automobile owned by a friend whose name he could not recall to the point where he boarded the bus. The bus which he boarded was not headed directly toward the Post Office in the business district of the city, but in a different direction on a circuitous route which required several miles' extra travel to reach the downtown area. He denied that in getting on the bus on the particular day he was laying grounds for this suit; but, on cross-examination by the City Attorney, he admitted that *he had never previously ridden a bus in Memphis and that he had not ridden one since the incident in question.*

Plaintiff admitted further that he is the owner of an automobile at the present time and that he owned one at the time of the particular incident—the only occasion on which he had ridden a bus. It is thus obvious that he was not a regular or even an occasional user of bus transportation; that in reality he boarded the bus for the purpose of instituting this litigation; and that he is not in the position of representative of a class of colored citizens who do use the buses in Memphis as a means of transportation. This is, therefore, not a case involving an actual controversy. Moreover, plaintiff has not suffered the irreparable injury necessary to justify the issuance of an injunction. In fact, his own testimony shows that he has not been injured at all.

Accordingly, the action is dismissed.

ORDER

This cause came on to be heard before a three-judge court (as required and provided for by United States Code, Title 18, section 2284) on January 6, 1958, and again on January 11, 1958;

And the case having been duly considered upon the pleadings, the testimony, the briefs and the arguments of the parties;

And it appearing, for the reasons set forth in an opinion filed contemporaneously herewith, that no actual controversy between plaintiff and defendants exists and that, therefore, there is no occasion for declaratory judgment or the issuance of an injunction;

The action is dismissed.

TRIAL PROCEDURE
Evidence—Georgia

Horace INGRAM v. STATE

Court of Appeals, Georgia Division No. 2, April 15, 1958, 103 S.E.2d 666.

SUMMARY: Defendant was convicted of bribery and of improper practices to influence the opinion of police officers in the city of Atlanta, Georgia. He appealed on the ground, among others, that evidence that members of the white and colored races drank out of the same whiskey bottle at defendant's place of business was irrelevant. The Court of Appeals reversed, holding that such evidence was highly prejudicial and reversible error, particularly in view of the present racial tension. Portions of the opinion disposing of these grounds are reproduced below:

Before GARDNER, P.J. and CARLISLE and TOWNSEND, JJ.

[SYLLABUS BY THE COURT]

* * *

Horace Ingram was indicted, tried and convicted in the Superior Court of Fulton County for the offense of bribery. In his bill of exceptions he assigns error on the overruling of de-

murrers to each of the 4 counts of the indictment, and also on the denial of his motion for new trial as amended by the addition of 10 special grounds.

OPINION

TOWNSEND, Judge.

* * *

As to grounds 8, 9 and 10, the following occurred on direct examination of Mrs. Maymie Lee, a witness for the State:

"Q. Now have you seen anybody actually drinking anything out there?

"A. Yes, I have.

"Q. What have you seen anybody drinking?

"A. Well, I have seen them pass the liquor bottle around.

"Q. See who pass the liquor bottle around?

"A. The men, Horace Ingram, and all of them down there at the garage.

"Q. By all of them, I will ask you whether you mean all of them down there, Rufus Jenkins, Horace, all of them?

"A. Yes, sir.

"Q. You mean just pass the bottle back and forth?

"A. Yes.

"Q. White folks and colored both?

"A. Yes, sir.

"Q. And all of them drink out of the same bottle?

"A. Yes, sir."

On objection made and motion for a mistrial on the ground that the solicitor, in the form of questions, was making remarks of an irrelevant, inadmissible, inflammatory and prejudicial nature, and that the answers were objectionable for the same reason, the court stated, "I don't consider that a derogatory remark."

[*Not Relevant*]

While, on the issue of whether the defendant kept a disorderly house, evidence that drinking was going on was admissible, whether prejudicial or not, it is perfectly obvious that whether or not members of the white and colored races drank out of the same bottle had no relevancy. It is also obvious that the form of the questions as herein set out sought to point up the testimony that mixed drinking was habitually practiced at the defendant's garage. The court held that such evidence was not derogatory to the defendant, and, while this may well be true in an abstract sense, we are of the opinion that as a practical matter it was exactly the sort of inadmissible evidence which would be most likely to incline a jury against him. The court, and every citizen of this State, is well aware that at the present moment Georgia is one of a minority of States which adheres to the position that mixing of the races is not desirable, and that the issue of racial integration is fraught with great emotional tension in the face of Brown v. Board of Education of Topeka, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, and other cases seeking to force racial integration in schools and other public and quasi-public places. In this State it is common knowledge that the accepted way of life for both races includes separate restaurants, separate drinking fountains in public places, and separate facilities for eating and drinking generally. Accordingly it cannot be said with any assurance that testimony that members of the white and colored race drank out of the same whisky bottle would not have a prejudicial effect. Obviously counsel for the State sought that effect by the nature of the questions asked in order to stress the fact that the defendant drank out of the same whisky bottle with members of the colored race. The effect of such testimony could not be eradicated by the court's statement, "I do not consider that a derogatory remark." The Federal courts have been very zealous in guarding members of the minority races against the introduction of testimony of this nature, and are quick to hold that mention of racial differences is prejudicial to the defendant's right to a fair trial. See Fontanello v. U.S., 9 Cir., 19 F.2d 921; United States v. Remington, 2 Cir., 191 F.2d 246, certiorari denied 343 U.S. 907, 72 S.Ct. 580, 96 L.Ed. 1325; Ross v. U.S., 6 Cir., 180 F.2d 160. Courts of this State have also been careful to protect members of the black race against such prejudice. See Cofield v. State, 14 Ga.App. 813, 82 S.E. 355; Thompson v. State, 27 Ga.App. 637, 109 S.E. 516. The purpose of the laws of this country, both State and Federal, is to afford equal protection to all. Accordingly, the defendant, a white man, is also entitled to that protection. As long as it exists in this State, our courts must continue to recognize that racial prejudice has no place in the administration of justice.

Any error committed upon the trial is more likely to have been prejudicial in this case, due to the closeness of the evidence and to the great volume of publicity given the case prior to the trial than would be true in a case not involving these factors. Fitzgerald v. State, 184 Ga. 19, 190 S.E. 602. The trial court erred in denying the motion for a new trial as to grounds 4, 8, 9 and 10.

* * *

Judgment reversed.

GARDNER, P.J., and CARLISLE, JJ., concur.

TRIAL PROCEDURE
Grand Juries—Mississippi

J. C. CAMERON v. STATE

Supreme Court of Mississippi, April 28, 1958, 102 So.2d 355.

SUMMARY: The defendant, a Negro, was sentenced to death for the rape of a white woman. A motion to quash the indictment alleged a systematic exclusion of Negroes from the grand jury which indicted him, thus denying him the equal protection of the laws guaranteed by the Fourteenth Amendment. The trial court overruled the motion to quash, ruling that the weight of evidence presented indicated that the only Negroes excluded were those who were unqualified for jury service according to Mississippi law, and that white persons who were similarly unqualified were also excluded. The Supreme Court of Mississippi upheld the refusal to quash, and rejected other appeal counts alleging failure to prove the *corpus delicti*, improper admission of evidence, statements of opinion by a venireman, and improper admission of a confession.

McGEHEE, Chief Justice.

On the 4th day of March 1957 the appellant J. C. Cameron, a Negro, had been arrested for the crime of rape against Mrs. C. T. Travis on December 18, 1956, and for the crime of rape committed on February 3, 1957, against Mrs. Polly Hales and against Mrs. Euna Mae Johnston, respectively, in the City of Brookhaven, Lincoln County, Mississippi. On the said 4th day of March 1957 a local member of the Lincoln County bar was appointed by the Circuit Court of the county to defend the appellant against the said charge of the crime committed against the said Mrs. Polly Hales and of the one against Mrs. Euna Mae Johnston, respectively, for both of which the appellant had been indicted, and on March 19, 1957, another local attorney was appointed by the court to assist in the defense of the appellant on the two said indictments, since the accused was unable to employ counsel for his defense in either of those cases.

The three victims of the said crimes were all adult married white women.

[*Arrested as Suspect*]

While the officers were investigating the crime which had been committed against Mrs. C. T. Travis on December 18, 1956, they arrested the appellant on February 7, 1957, as a suspect of the commission of the said crime, for the purpose of an investigation and comparison of finger prints, etc. After taking the accused into custody, and while transporting him in an automobile from Brookhaven to the office of the Mississippi State Highway Patrol in Jackson, Mississippi, the two highway patrolmen informed the accused upon leaving Brookhaven in the automobile for Jackson that the reason that they had taken him into custody was that he was suspected of having committed the said crime against Mrs. C. T. Travis on December 18, 1956, and that they were also investigating the crimes committed against Mrs. Polly Hales

and Mrs. Euna Mae Johnston, respectively, on February 3, 1957. Without waiting to be questioned by the said officers he responded to their explanation as to why he had been arrested by saying: "I am the Negro."

It does not appear that while the officers were enroute from Brookhaven to the Mississippi State Highway Patrol Office in Jackson that there was any further discussion of either of the said crimes between the officers and the accused. The distance from Brookhaven to Jackson was approximately 55 miles. When the officers arrived with the accused at the office of the State Highway Patrol in Jackson the accused was first allowed to eat his supper, and soon thereafter, upon the arrival of the sheriff of Lincoln County, the Chief of Police of Brookhaven, and the District Attorney, he made a full, free and voluntary confession in considerable detail of his guilt of the crime against Mrs. Euna Mae Johnston, for which he was later indicted on September 4, 1957, and for which he was tried, convicted and given a death sentence, as fixed by the jury, on September 23, 1957.

[*Committed to Hospital*]

Prior to the September 1957 Term of the court, to-wit on March 27, 1957, the circuit judge, upon motion of the defense attorneys, committed the accused to the Mississippi State Hospital for the Insane at Whitfield, Mississippi, in order that it might be determined by the medical staff of the said institution as to whether the accused was then presently sane or insane and as to whether he was sane or insane at the time of the commission of the said crimes on December 18, 1956, and on February 3, 1957, his commitment to the Mississippi State Hospital for the Insane having been only for the purpose herein before mentioned, and in order that if the accused was found to be sane at that time and also at the time of the commission of the alleged crimes, the order of the court provided that "immediately after the completion of the said examination and report, if the defendant be found presently sane, then and in that event, the defendant shall be returned to the custody of the sheriff of Hinds County, Mississippi, to be dealt with according to law and subject to the further order and judgments of this court."

The record in the instant case fails to disclose what the report of the staff at the Mississippi State Hospital for the Insane was, but the record does disclose that he was returned to the custody of the sheriff, presumably because they had found the accused to be sane, since it was only in that event that he was to be returned to the custody of the said officer, under the terms of the order of commitment. The defense of insanity was not interposed by the accused upon the trial of the instant case, and no contention is made here in that behalf.

The indictment in the instant case was returned by the grand jury of Lincoln County on September 4, 1957, as aforesaid. Both of the attorneys appointed for the defense of the accused were residing at Brookhaven, the county seat of Lincoln County, while the grand jury was in session, and at all times from the date of the commission of the alleged crime on February 3, 1957, and on the date of the return of the indictment in the instant case on September 4, 1957.

No challenge was made to quash the panel or to the array of the jurors either before or at the time the grand jury was being impaneled at the September 1957 term of the court.

[*Motion To Quash Filed*]

But on September 10, 1957, which was during the second week of the September Term of the court, and after the grand jury had made its report of the indictments found, the defendant filed a "motion to quash (the) indictment", on the ground that the accused was "an adult resident citizen of Lincoln County, Mississippi, and a member of the Negro race. That the indictment returned against him by the grand jury of Lincoln County, Mississippi, charges him with the crime of rape committed on a white lady. That his crime under the laws of the State of Mississippi carries, if convicted, as a maximum sentence, the death penalty."

The motion to quash the indictment further alleged "that this defendant was indicted by a grand jury drawn from a venire composed of all white persons, and which said venire did not have the name of a Negro person thereon. That there are Negroes in Lincoln County, Mississippi, qualified for jury service, but notwithstanding this, none were selected for this venire, and the reason for this is that for a great number of years previous to and during this term of court, there has been in said County a systematic intentional deliberate and invariable practice on the part of the administrative officers of Lincoln County,

Mississippi to exclude Negroes from jury lists, jury boxes and jury service, and that this practice has resulted and does now result in the denial of the equal protection of the laws to this defendant as guaranteed by the Fourteenth Amendment to the United States Constitution."

[*Defendant's Proof*]

In support of the motion to quash the indictment the defendant introduced a number of former law enforcement officers of the county, and proved that no Negro had actually served on either the grand or petit juries in the county during a period of more than thirty years, and the prosecution failed to show that any Negroes had been summoned for jury service or served on either of such juries during the said period of time prior to the September 1957 term of the court. But the State did prove on the hearing of this motion to quash the indictment, the method of selecting the names placed in the jury boxes for service for the year 1957 to be as follows: That the circuit clerk furnished to the board of supervisors a list of 3,132 male qualified electors from which the individual members of the board were to select a number of those in their respective districts whom they considered qualified for jury service, and return to the circuit clerk a list of those so selected from each supervisor's district. The number selected by the board of supervisors for jury service for that year was 471 male qualified electors. The proof further showed that there were 265 male Negro qualified electors in the county, but there were no marks or other indication on the list of 3,132 male qualified electors furnished by the circuit clerk to the board of supervisors to show whether those on the list were white or Negro men.

[*Juror Requirements*]

Section 1762, Code of 1942, provides who are competent jurors. Among the requirements to render a qualified elector eligible for jury service he must be a male citizen, at least twenty-one years of age, who is a qualified elector and able to read and write, has not been convicted of an infamous crime, or the unlawful sale of intoxicating liquors within the period of five years and who is not a common gambler or habitual drunkard. In other words, there is a difference between being a qualified elector and being one eligible for jury service. Moreover another statute, Section 1766, Code of 1942, provides that in filling the jury boxes for each year the supervisors shall select the names of those who are men of good intelligence, sound judgment and fair character.

Each of the five members of the board of supervisors testified upon the hearing of this motion to quash that pursuant to the charge of the circuit judge at each term of the court that the supervisors should select men for jury service of good intelligence, sound judgment and fair character, that each of the said supervisors in selecting a sufficient number of men to serve on the juries for the year had rejected, the names of numerous white qualified electors and had failed to place their names on the list of names that were to be placed by the circuit clerk in the jury boxes these white male electors whom the supervisors did not deem to meet the qualifications required for jury service; that they applied the same rule to white qualified electors as they did the negroes in determining whether or not they were men of good intelligence, sound judgment and fair character, and in all respects met the qualifications for jury service provided by law.

[*Circuit Clerk Testifies*]

The circuit clerk who was introduced by the accused, while admitting that prior to that term of court she did not know of any Negro who had actually served on a grand or petit jury, or who had been summoned for such service, during her tenure of office, over a perid of approximately twenty years either as circuit clerk or deputy circuit clerk, that there were names of Negroes placed by her in the jury boxes for the year 1957. She took the list of 471 names which had been selected by the supervisors and furnished to her in March or April 1957 for jury service for the remainder of said year, and by a casual inspection of the list, at the time she was on the witness stand, testified that she then saw the names of at least five Negroes thereon whose names she placed in the jury box prior to the drawing of the grand and petit juries for the September 1957 term of court, and it was her recollection that there were some Negroes other than those five whose names were placed in the jury box at the same time.

Moreover it was shown without dispute that during the September 1957 term of the court, and on the day prior to the hearing of the mo-

tion to quash this indictment during the second week of the term, a Negro by the name of N. G. Herring had been summoned for jury service and had appeared in court and had been excused by the circuit judge when he claimed his exemption from jury service as a minister of the gospel.

[*List Examined*]

The chancery clerk testified that each member of the board of supervisors had in March or April 1957 gone over the list of 3,132 male qualified electors furnished to them by the circuit clerk and had checked on this list the names of those selected by them for jury service, by putting a check mark opposite their names on the list of 3,132 qualified electors. That they selected a total of 471 as being a sufficient number for jury service for the remainder of that year; that there were no indications on the list of 3,132 qualified electors to indicate whether they were white males or Negroes, and that the list of 471 names selected by the members of the board of supervisors for jury service did not contain any indication as to whether they were white or Negro men, and that he as clerk of the board of supervisors returned this list of 471 names to the circuit clerk in order that she might prepare slips containing their names and place the same in the jury boxes.

The proof made on behalf of the State that the jury list had been made up by the members of the board of supervisors solely on the basis of their qualifications for jury service, and not on the basis of race, was wholly undisputed, except by the inference from the circumstance that in the years past no Negro had been summoned or had served on either the grand or petit juries. This last mentioned fact of no Negro having served as a juror during the years complained of applies with equal force in a large majority, if not all, of the eighty-two counties of this state. However, since the decision of the United States Supreme Court in the case of Patton v. State of Mississippi, 332 U.S. 463, 68 S.Ct. 184, 186, 92 L.Ed. 76, it is a matter of common knowledge that the members of the board of supervisors in most, if not all, of the counties of this State have been placing the names of some Negroes in the jury boxes each. year, such of those who meet the requirements of being men of good intelligence, sound judgment and fair character and who do not possess the disqualifications enumerated in Section 1762 of the Miss. Code of 1942 as to who are competent jurors. They are not required to place in the jury boxes the names of all the Negroes who meet these qualifications, since they do not now and have never placed in the jury boxes for any one year the names of all of the white men who meet these qualifications, and it is not contemplated that they should do so since all of them are not needed for jury service during any one year.

It was stated in the opinion in Patton v. State of Mississippi, supra, that: "Whether there has been systematic racial discrimination by administrative officials in the selection of jurors is a question to be determined from the facts in each particular case."

[*Judge Acquainted With Board*]

In the instant case the trial judge, who was born and reared in the City of Brookhaven, where he still resides, is naturally well acquainted with these members of the board of supervisors who testified under oath that they rejected the names of numerous white male qualified electors for jury service on the ground that they did not possess the qualifications required therefor, and that they rejected the names of Negroes for the same reasons, and not on account of race, in an effort to get good jurors in furtherance of the proper administration of justice in the courts, and we are not prepared to say that the trial judge in passing upon the issue of fact presented by this motion to quash the indictment, was manifestly wrong in his conclusion that there had been no systematic, intentional, deliberate discrimination on account of race. It is a well settled rule, and one which is uniformly followed by this court, that the decision of a trial judge on an issue of fact will not be disturbed on appeal unless it is clear that he is manifestly wrong.

[*Based on Testimony*]

The trial judge heard under a reserve ruling all of the testimony introduced on the motion to quash the indictment, and based his conclusion to overrule the motion upon that testimony, notwithstanding the objection of the District Attorney to the competency of such testimony, the objection being based upon the ground that this Court has repeatedly held that in the absence of fraud, which is not alleged in the

instant case, the accused must challenge the array of panel before or at the time the grand jury is being impaneled.

Section 1784, Code of 1942, provides that: "Before swearing any grand juror as such, he shall be examined by the court, on oath, touching his qualification; and, after the grand jurors shall have been sworn and impaneled, no objection shall be raised, by plea or otherwise, to the grand jury; but the impaneling of the grand jury shall be conclusive evidence of its competency and qualifications; but any party interested may challenge or except to the array for fraud."

[*Timing of Objections*]

In the case of Flowers v. State, 209 Miss. 86, 41 So.2d 352, the court held that under the foregoing statute objections to qualifications of grand jurors must be made, if at all, before such jurors are impaneled, unless accused is denied the opportunity for doing so. In the instant case the accused was in jail during the session of the grand jury throughout the previous week, and both of the defense counsel resided at Brookhaven, as hereinbefore stated, and there was no denial of an opportunity for the accused to have interposed a motion to quash the panel or challenge the array of jurors at the time the grand jury was being impaneled, and it is not claimed that no opportunity was afforded to the defense for making the motion to quash the indictment at the time required by the said Section 1784, Code of 1942.

In the later case of Walker v. State, Miss., 91 So.2d 548, said Section 1784 was upheld and the Court cited therein the following cases: Dixon v. State, 74 Miss. 271, 20 So. 839; Hill v. State, 89 Miss. 23, 42 So. 380; and State v. Forbes, 134 Miss. 425, 98 So. 844. Moreover this statute has been held applicable even to a defendant who was not advised that any accusation against him was being considered by the grand jury. Head v. State, 44 Miss. 731; Durrah v. State, 44 Miss. 789; Posey v. State, 86 Miss. 141, 38 So. 324; Cain v. State, 86 Miss. 505, 38 So. 227. In the instant case the accused had been in jail awaiting the action of the grand jury from the date of his arrest on February 7, 1957, until this indictment was returned against him on September 4, 1957, and he had every reason to believe that the charges against him, and for which he was being held in jail, would be investigated by the grand jury when it was convened.

In the case of Walker v. State, supra, the Court further said [91 So.2d 552]: "In Flowers v. State, 209 Miss. 86, 41 So.2d 352, certiorari denied and appeal dismissed in the Supreme Court of the United States May 1, 1950, 339 U.S. 946, 70 S.Ct. 800, 94 L.Ed. 1360, in reconciling the above statute with the decisions of the Supreme Court of the United States on the question of due process, this Court again held that objections, if any, to the qualifications of grand jurors must be made, if at all before they are empaneled, and not after, unless the accused has been denied the opportunity for doing so. In that case it was shown that, at the time of the return of the indictment, the defendant was represented by an able lawyer; that the defendant had previously given an appearance bond to await the action of the grand jury, and was presumed to have been at court when the grand jury was empaneled; that he had reason to believe that his case would be investigated by the grand jury when it was empaneled; and that he could have obtained information as to the venire from which the grand jury would be drawn eight or ten days in advance of the court term; that after the return of the indictment, he pled thereto, sought and obtained a severance, and presented a motion for a change of venue; and that he then presented motions to quash the first and second panels of the petit juries before filing his motion to quash the indictment on the ground that there had been discrimination against members of the Negro race in the selection of the grand jury. From all of these circumstances, the court necessarily concluded that the accused had not been denied an opportunity to object to the qualifications of the grand jury."

[*Relates to Procedure*]

The statute as to when objections to the competency of a grand jury shall be raised, relates to a matter of state procedure, but no good reason can be assigned as to why a sovereign state may not enact a valid statute to the end that the efficient and orderly administration of justice may be attained, and without unnecessary and added expensive delay. Otherwise an accused could wait until after a county had gone to the expense of having summoned and convened at court a large number of special veniremen from which the petit jury is to be selected, that is to

say, he could wait that late to file his motion to quash the indictment, assuming that the State has no authority to fix a time at which a motion to quash an indictment should be reasonably filed.

But aside from the question as to whether or not the motion to quash the indictment in the instant case came too late, we are of the opinion that we would not be justified in reversing the decision of the trial judge upon the proof heard by him under reserve ruling thereon at the hearing of the motion to quash the indictment, which was filed after the grand jury had returned the indictment and adjourned. The proof on behalf of the accused on the motion to quash the indictment did clearly establish the fact that no Negro had served on a grand or petit jury in Lincoln County for a period of 30 years prior to the return of this indictment, but that fact alone is insufficient to invalidate the indictment. When this prima facie case was made by the accused under the holding of the case of Patton v. State of Mississippi, supra, the State in the instant case recognized that the burden had shifted to it to show that the failure to place the names of more Negroes in the jury boxes of Lincoln County for the year 1957 than were placed therein, was on some ground other than because of race, and the trial judge, who heard the testimony and decided this issue of fact, was of the opinion that the failure to place the names of more Negroes in the jury boxes was due to the same fact that the names of numerous white qualified electors were rejected in the selection of the names to be placed in the jury boxes for that year—an effort to select only men of good intelligence, sound judgment and fair character.

[*Systematic Exclusion is Issue*]

If the fact alone that no Negro may have served on a grand or petit jury in any county in this State during the past 30 years is to invalidate every indictment returned against a Negro for an offense against a white person, then the question presents itself as to when the circuit courts in this state may begin to have valid indictments returned. The precise question before us is not whether in years past there has been racial discrimination in the selection of jurors, but rather whether a systematic intentional deliberate and invariable practice of excluding the names of Negroes from jury lists, jury boxes and jury service was being followed at the time of the filling of the jury boxes for the year 1957. The record in the instant case discloses the fact that the names of Negroes are being placed in the jury boxes, and shows that the members of the board of supervisors are applying the rule as to whether or not the qualified electors met the requirements for jury service to both white and Negro men alike.

In the case of Seay v. State, 212 Miss. 712, 55 So.2d 430, 431, the record disclosed that the name of no Negro had been placed in the jury box out of which the grand and petit juries had been drawn for the last 50 years. The testimony of the officers in that case, as pointed out in the opinion by this Court, "failed to disclose any reason for the absence of the names of Negroes in the jury boxes." Such is not the case in the record now before us. We conclude that there was no error committed by the trial judge in overruling the motion to quash the indictment in the instant case, both on the ground that the motion came too late, and also on the ground that the trial judge was amply warranted in accepting as true the testimony offered by the State to show that numerous white qualified electors were excluded from the jury list for the same reason that Negroes were excluded therefrom.

[*Corpus Delicti*]

The next assignment of error is that the trial court erred in not holding that the State of Mississippi failed to prove the corpus delicti. On the night of the commission of this crime the victim was at home alone, awaiting the return of her husband from bird hunting. It was after dark on February 3, 1957, when he arrived. Immediately prior thereto, according to both the testimony of the prosecutrix and the written confession of the accused, he entered her home, picked up a paring knife from a table, and advanced on her. A struggle ensued during which she knocked the knife out of his hand and onto the floor. They then clinched and fell to the floor, when the accused took his own knife out of his picket and cut her throat. The prosecutrix testified that when she regained consciousness he was on top of her and raping her; that he then committed further violence against her and that when she again regained consciousness her clothing had been pulled up around her waist. He had left her home, and her husband and his

hunting companion soon arrived and took her immediately to the hospital where she remained for a period of 24 days. A nearby neighbor heard the victim hollering and screaming immediately before the arrival of her husband and his hunting companion. At the hospital Doctors Crawford and Robbins attended her in the emergency room, where Dr. Robbins says that he made the necessary examination to ascertain whether or not there were any signs on her person of her having been raped, and that not seeing any such signs by this incomplete examination the doctors concluded that it was unnecessary to make a further and more complete examination to determine definitely whether or not the crime had been committed. Dr. Crawford was out of the State at the time of the trial and it was stipulated by counsel for the defense and for the State that if Dr. Crawford were present that he would testify that no physical examination was made of her to the extent of determining whether or not the crime had been committed. She did not complain to either of the doctors that this crime had been committed against her, but this is explained by the fact that she was in a critical condition and that the doctors were concerned in trying to save her life during that night. They had advised her and her husband that she should not be permitted to talk on account of the condition of her cut throat. Therefore it was not until the next morning that her husband ascertained from her that such a crime had been committed by her assailant. Objection was made to the competency of the testimony of her husband as to what she told him on the next morning, and the objection to the admission of his testimony in that behalf was overruled. Assuming that this was error we do not think that it constituted reversible error under all of the facts and circumstances of the case, since the accused corroborated her testimony in detail in his confession, which was taken down by a stenographer at the office of the Mississippi State Highway Patrol, in the presence of two patrolmen, the sheriff of Lincoln County, and the Chief of Police of the City of Brookhaven and also in the presence of the District Attorney. There was no material discrepancy in the version given by the victim on the witness stand at the trial and that given in the confession of the accused. The physical condition of the throat of the victim, and the other testimony fully explained the failure of the victim to have made specific accusation against the accused on that night.

This Court has repeatedly held that where there is a free and voluntary confession of the accused, the proof of the corpus delicti is not required to be as strong as it must be in the absence of a confession. The third and fourth assignments of error are the admission of the above mentioned testimony of the husband of the victim, and the admitting into evidence of the confession of the accused. We do not think that either the second, third or fourth assignments of error are well taken.

[*Propriety of Evidence*]

It is next complained that the trial court erred in admitting in evidence the bloody clothing of the prosecutrix. We think that there was no error in admitting such evidence as a part of the res gestae and also to corroborate the testimony of the prosecutrix when she said that upon regaining consciousness she found that the stride of her panties had been torn, and that she had discovered this to be true before she was carried to the hospital. The proof disclosed that after she arrived at the hospital some of her clothing was torn off in the emergency room upon the instructions of the attending physicians.

Finally it is assigned as error that the trial court should have sustained the motion of the accused to enter a mistrial and quash the special venire on the ground that one of the veniremen volunteered the statement in the presence and hearing of the others, or in the hearing of several of them, that it was the opinion of the prospective juror that the accused "was automatically quilty". The trial judge had instructed the jurors at the beginning of their voir dire examination not to volunteer any statements in regard to their opinions, and he sent this particular juror to jail for having violated such instruction. He then interrogated all of the other veniremen as to whether or not they could disregard this expression of opinion by this particular venireman and base their verdict solely upon the testimony that they should hear on the trial of the case and under the instructions that would be given by the court as to the applicable law. They all answered this question in the affirmative. Section 1763, Code of 1942, which has been the law of this state since 1880, provides that "Any person, otherwise competent, who will make oath that he is impartial in the case, shall be compe-

tent as a juror in any criminal case, notwithstanding the fact that he has an impression or an opinion as to the guilt or innocence of the accused, if it appear to the satisfaction of the court that he has no bias or feeling or prejudice in the case, and no desire to reach any result in it, except that to which the evidence may conduct; * * *". The jury selected met the requirements of this statute.

Moreover the judge had theretofore quashed the first special venire, and dismissed from service in the case the numerous jurors summoned, because one of them had stated that he had an opinion, since the defendant "had admitted the crime". We think that the trial judge exercised the utmost caution to see to it that the accused obtained a fair and impartial trial.

[*Sustained by Evidence*]

We think that the verdict of the jury was amply sustained by competent evidence, and that no reversible error was committed upon the trial. No contention is made that the confession of the accused was obtained by coercion, threats or promises of reward. The defendant's confession was not only free and voluntary, but the same was corroborated by the fact that the defendant claimed that he had left the yellow-handle knife with which he cut his victim's throat with "Mother Walker", where an officer found it, and it was introduced in evidence and the defendant did not testify in his own behalf.

The only attack made upon the confession of guilt is the contention that this 22-year-old Negro, who was an employee of a filling station at the time of the commission of the crime, had attended school between the ages of 6 and 18 years and had been unable to advance further than the fifth grade at school, he having advanced only one grade in each two or more years of his attendance at school, and that therefore he was a person of low mentality, although not insane or incapable of distinguishing between right and wrong. But it is not shown with what regularity he attended school during the sessions that he was enrolled as a student. Precisely, the contention is that the confession should not have been admitted for the reason that the defense claimed that he would not have been capable of understanding and comprehending, or of making a sustained and continuous recital in his confession of the incident, which the confession discloses had transpired at the scene of the crime. We think that all of this raised an issue of fact for the determination of the jury, and that the jury was amply warranted from all of the facts and circumstances of the case in finding that he was accountable for his crime. The accused was ably represented by counsel who are to be commended for their faithfulness and fidelity in the handling of his defense.

The verdict of the jury upon which the judgment and sentence to death was rendered should be affirmed.

Affirmed and Wednesday, May 28, 1958, is hereby fixed as the date for the execution of the death sentence in the manner provided by law.

All Justices concur.

TRIAL PROCEDURE

Grand Juries—North Carolina

STATE v. A. E. PERRY

Supreme Court of North Carolina, May 7, 1958, 103 S.E.2d 404.

SUMMARY: The defendant, a Negro, was indicted by a North Carolina grand jury for using drugs and instruments with intent to procure a miscarriage. The defendant alleged that he was denied due process of law and the equal protection of the laws as guaranteed by the

United States and North Carolina Constitutions because of systematic exclusion of Negroes from the grand jury, and asked for an extension of time to gather evidence. The trial court denied the request and defendant was convicted and sentenced. Defendant appealed to the Supreme Court of North Carolina. That court reversed and remanded the case, finding that ". . . the trial court denied defendant a reasonable opportunity and time to investigate and produce evidence . . ." of unlawful exclusion of Negroes from juries.

PARKER, Justice.

The defendant is a Negro doctor. The bill of indictment, which charges that the offense was committed in Union County on 4 October 1957, was found on 28 October 1957 by the grand jury of Union County at the October 1957, Mixed Term, Union County Superior Court, which convened on the day the indictment was found.

The defendant on 28 October 1957, in due season, before pleading to the bill of indictment (State v. Linney, 212 N.C. 739, 194 S.E. 470; State v. Speller, 229 N.C. 67, 47 S.E.2d 537), filed a written motion to quash the bill of indictment, for the reason that Negroes because of their race have been systematically excluded from serving upon grand juries of Union County for a long period of time, and that Negroes because of their race were excluded from serving upon the grand jury of Union County at the term of court when the bill of indictment was found, and that such systematic exclusion of members of the defendant's race from the grand juries of Union County, and particularly from the grand jury that found the bill of indictment against him, is a violation of his rights guaranteed to him by the due process and equal protection clauses of the Federal Constitution, and by Art. I, Sec. 17, of the State Constitution. The motion to quash prayed that an inquiry be had in order that the defendant's rights may be adequately protected, and that the court cause process to be issued as necessary to permit the defendant to investigate the alleged violation of his constitutional rights.

On 28 October 1957, the day the bill of indictment was found, the trial court ordered a special venire of 50 persons from Anson County to appear in court on 30 October 1957, from which a trial jury was to be selected in the case.

On 30 October 1957 the State announced it was ready to proceed with the trial. Whereupon, counsel for the defendant stated to the court, that before entering a plea to the indictment, they renewed the motion made on 28 October 1957 to quash the indictment for the reasons set forth in the motion, and requested that they be given time and opportunity to inquire into the alleged systematic exclusion of Negroes from grand jury service in Union County. In support of the motion to quash, counsel for the defendant presented to the court an affidavit made by Samuel S. Mitchell, a Negro lawyer of counsel for the defendant. This is a summary of the material parts of the affidavit: The defendant is a Negro. He has made inquiry, and is informed, and believes upon such information, that the grand jury which indicted the defendant was unlawfully constituted for that Negroes solely because of their race have been systematically excluded from serving on grand juries of Union County for many years. All of counsel for the defendant are nonresidents of Union County, and need opportunity to inquire into the matter of such exclusion, and to gather evidence to present to the court on the matter. Counsel for the defendant then stated to the court that in order to substantiate their motion to quash it was necessary for the defendant to adduce evidence of such systematic exclusion of Negroes from grand jury service in Union County, and they requested that they be given an opportunity to present such evidence. The trial court inquired: "Is that all?" Counsel for defendant replied: "That's all, yes, your Honor." The trial court then found as a fact that no evidence had been offered on the motion to quash, except the affidavit of Samuel S. Mitchell, and denied the motion to quash. To such denial the defendant excepted. The court then asked the defendant how did he plead to the indictment. Counsel for defendant replied Not Guilty. The trial then proceeded. A jury was selected, sworn and empaneled from the special venire of Anson County. The trial jury found the defendant guilty, and from a sentence of imprisonment he appeals to this Court.

[*Constitutionally-Protected Right*]

For over 50 years the United States Supreme Court has adhered to the view that valid grand jury selection is a constitutionally protected right. Reece v. State of Georgia, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77.

The indictment of a Negro defendant by a grand jury in a state court from which members of his race have been systematically excluded solely because of their race is a denial of his right to the equal protection of the laws required by the Fourteenth Amendment to the United States Constitution. Reece v. State of Georgia, supra; Shepherd v. State of Florida, 341 U.S. 50, 71 S.Ct. 549, 95 L.Ed. 740; Cassell v. State of Texas, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839; Patton v. State of Mississippi, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76, 1 A.L.R.2d 1286; Norris v. State of Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074; Rogers v. State of Alabama, 192 U.S. 226, 24 S.Ct. 257, 48 L.Ed. 417; Carter v. State of Texas, 177 U.S. 442, 20 S.Ct. 687, 44 L.Ed. 839; Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664. See Hernandez v. State of Texas, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 —persons of Mexican descent.

A like conclusion is reached in North Carolina by virtue of our decisions on "the law of the land" clause embodied in the Declaration of Rights, Art. I, Sec. 17, of the North Carolina Constitution. Miller v. State, 237 N.C. 29, 74 S.E.2d 513; State v. Speller, supra; State v. Peoples, 131 N.C. 784, 42 S.E. 814.

This Court held in State v. Peoples, supra, which was decided in 1902, that the exclusion of all Negroes from a grand jury solely by reason of their race, which finds an indictment against a Negro, denies him the equal protection of the laws in violation of his constitutional rights, and that a motion to quash the indictment would properly lie in such a case.

Art. I, Sec. 17, of the North Carolina Constitution states, "no person ought to be * * * in any manner deprived of his * * * liberty * * *, but by the law of the land." "The law of the land and due process of law are interchangeable terms." Eason v. Spence, 232 N.C. 579, 61 S.E.2d 717, 721.

"The words of Webster, so often quoted, that by 'the law of the land' is intended 'a law which hears before it condemns,' have been repeated in varying forms of expression in a multitude of decisions." Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 64, 77 L.Ed. 158, 84 A.L.R. 527.

Due process of law is secured against state action by the words of the Fourteenth Amendment to the United States Constitution. Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595.

[*Application of Due Process*]

The Court said in Holden v. Hardy, 169 U.S. 366, 389, 18 S.Ct. 383, 387, 42 L.Ed. 780, 790: "This court has never attempted to define with precision the words 'due process of law,' nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice, which inhere in the very idea of free government, which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice, and an opportunity of being heard in his defense."

An objection to an indictment based on defects and irregularities in the drawing or organization of the grand jury must be taken "before the jury is sworn and impaneled to try the issue, by motion to quash the indictment, and if not so taken, the same shall be deemed to be waived." G.S. § 9-26; State v. Gales, 240 N.C. 319, 82 S.E.2d 80; Miller v. State, supra.

The question presented for decision by defendant's assignment of error to the denial by the court of his motion to quash the indictment is whether or not the court denied the defendant and his counsel a reasonable opportunity and time to investigate, prepare and present to the court evidence, if such existed, in support of the allegations of the motion to quash the indictment.

[*Defendant Has Burden of Proof*]

The burden of proof is upon the defendant here to establish the racial discrimination alleged in his motion to quash the indictment. Atkins v. State of Texas, 325 U.S. 398, 65 S.Ct. 1276, 89 L.Ed. 1692; Fay v. People of State of New York, 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043; Miller v. State, supra.

On 13 October 1957 the defendant was arrested on a warrant charging him with the same offense for which he was indicted by the grand jury. At a preliminary hearing on the warrant 18 October 1957 he was bound over to the Superior Court, which convened on 28 October 1957 for a two weeks term for the trial of criminal and civil cases. G.S. § 7-70.

Lillie Mae Rape is a white woman. The defendant is a Negro doctor. On 28 October 1957 the defendant filed a written motion for removal of his case from Union County for a fair trial. G.S. § 1-84. On the same day the judge, acting under the authority vested in him by G.S. §

1-86, instead of removing the case to another county ordered a special venire of 50 jurors from Anson County to appear in court on 30 October 1957 from which the trial jury was to be selected. On 29 October 1957 defendant's counsel filed a written motion requesting a continuance of the trial to a later term to enable them adequately to investigate and prepare the defendant's defense. On 30 October 1957 the special venire was in court, the court denied the motion for a continuance, and the motion to quash the indictment, and the trial began.

All of defendant's counsel are nonresidents of Union County. The State did not controvert the allegations of racial discrimination contained in the motion to quash and in the affidavit of Samuel S. Mitchell. We recognize that the allegations of racial discrimination in the motion to quash the indictment and in Mitchell's affidavit are in general terms, and state no specific facts. However, if defendant and his counsel were denied by the court a reasonable opportunity and time to investigate the matter of racial discrimination, it would seem that they would not be able to state in the motion to quash and in Mitchell's affidavit specific facts of racial discrimination, nor offer evidence to that effect, if such facts existed. The trial judge made no findings of fact as to the alleged racial discrimination in the composition of the grand jury.

[*Requirement of Fairness*]

Allegations in a motion to quash an indictment, because of racial discrimination practices in selecting a grand jury panel, challenge an essential element of proper judicial procedure—the requirement of fairness on the part of courts in trying persons accused of crime. However, "it cannot lightly be concluded that officers of the courts disregard this accepted standard of justice." Akins v. State of Texas, supra.

Whether a defendant has been given by the court a reasonable time and opportunity to investigate and produce evidence, if he can, of racial discrimination in the drawing and selection of a grand jury panel must be determined from the facts in each particular case. After a careful examination of all the facts in the instant case, it is our opinion that the trial court denied the defendant a reasonable opportunity and time to investigate and produce evidence, if such exists, in respect to the allegations of racial discrimination as to the grand jury set forth in the motion to quash and in the supporting affidavit of Samuel S. Mitchell. Whether the defendant can establish the alleged racial discrimination or not, due process of law demands that he have his day in court on this matter, and such day he does not have, unless he has a reasonable opportunity and time to investigate and produce his evidence, if he has any.

The judgment and verdict below are reversed, and the case is remanded for further proceedings. In the Superior Court the defendant will have the opportunity to present the evidence if any, that he may have as to the alleged racial discrimination in the grand jury panel. If the trial court at such hearing then finds there was no racial discrimination, the trial will proceed on the present indictment. If the trial judge then finds there was racial discrimination in the grand jury panel, and quashes the indictment, the defendant is not to be discharged. He will be held until an indictment against him can be found by an unexceptionable grand jury. State v. Speller, supra.

Reversed.

TRIAL PROCEDURE
Juries—Arkansas

Luther BAILEY v. STATE of Arkansas

Supreme Court of Arkansas, May 19, 1958, 313 S.W.2d 388

SUMMARY: A Negro convicted of rape in an Arkansas state court appealed to the state Supreme Court on the ground, among others, that the trial court erred in overruling a motion to

quash the regular and special panel of the petit jury. The motion to quash was made on the basis of an alleged systematic exclusion of Negroes from jury panels in the circuit in which he was convicted. The court found no evidence of such exclusion, stating that the right to trial by a jury of his peers does not include a right to have either a proportional number or any particular number of members of his race on the jury which tries him. The conviction was affirmed. 2 Race Rel. L. Rep. 997 (1957). Certiorari to the United States Supreme Court was denied. 355 U.S. 851, 2 Race Rel. L. Rep. 1097 (1957). The accused then filed a petition for a writ of habeas corpus, in the trial court, later changed to a petition under the Uniform Post-Conviction Procedure Act, alleging that he was denied the right to subpoena the jury commissioners. The trial court denied the petition, and the accused appealed to the state Supreme Court. The court, in affirming the denial, held that the question of permitting the jury commissioners to testify had either been finally decided or had been waived in the first trial.

ROBINSON, Justice.

Appellant, Luther Bailey, was convicted in the Pulaski Circuit Court, First Division, of the crime of rape, and was sentenced to death. On appeal to this court the judgment was affirmed. Bailey v. State, Ark., 302 S.W.2d 796. Certiorari to the United States Supreme Court was denied. Bailey vs. State of Arkansas, 355 U.S. 851, 78 S.Ct. 77, 2 L.Ed.2d 59. Later, appellant filed in the same court where he was convicted a petition for writ of habeas corpus alleging that certain of his constitutional rights had been violated. He alleged specifically that he was denied compulsory process to obtain witnesses, violation of Art. 2, § 10, of the Constitution of Arkansas, and the Fourteenth Amendment to the Constitution of the United States, and further that he is a member of the Negro race and that his conviction is void because Negroes have been systematically limited in selection of petit jury panels in the court where he was tried. He prayed that a writ of habeas corpus be issued to the end that the conviction be set aside. The trial court granted the petition to the extent of ordering the superintendent of the penitentiary, where petitioner was confined awaiting execution, to produce the petitioner in court. The petitioner then filed an amendment to the petition for writ of habeas corpus and stated: "* * * this is a petition under Act 419 of the 1957 Acts of Arkansas, known as the Uniform Post-Conviction Procedure Act. * * * That your petitioner has heretofore sought relief from his conviction by appeal to the Arkansas Supreme Court and by application for writ of certiorari to the United States Supreme Court. That the conviction under which the plaintiff is held and was sentenced is void and/or voidable in that he was denied the right of having compulsory process for obtaining witnesses in his favor in violation of Article 2, Section 10 of the Constitution of the State of Arkansas, the Fourteenth Amendment to the Constitution of the United States"; and prayed that his conviction be set aside.

[*Uniform Act Challenged*]

The State, by the Attorney General, resisted the petition and affirmatively pleaded that Act 419 of 1957 is unconstitutional; that the Act would nullify Art. 2, § 11, of the Constitution of Arkansas providing that the writ of habeas corpus shall not be suspended. At a hearing on the petition it was shown that prior to the trial the attorney for the defendant had requested the clerk of the court to issue subpoenas for the jury commissioners who had served as such from 1952 to the March term, 1956, inclusive, and that the court had refused to allow the clerk to issue the subpoenas. The trial court denied the petition, and the petitioner has appealed.

Act 419 of 1957 provides: "Section 1. Any person convicted of a felony and incarcerated under sentence of death or imprisonment who claims that the sentence was imposed in violation of the Constitution of the United States or the Constitution or laws of this State, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy, may institute a proceeding under this Act to set aside or correct the sentence, provided the alleged error has not been previously and finally litigated or waived in the proceedings resulting in the

conviction or in any other proceeding that the petitioner has taken to secure relief from his conviction.

* * *"

It will be noticed that the Act does not apply where the alleged error has been finally litigated or waived in the proceedings resulting in the conviction. Without a doubt the question of whether the trial court erred in refusing to permit the jury commissioners to be subpoenaed was either finally litigated or the point was waived. In the trial of the case on its merits, the attorney for the defendant requested that subpoenas be issued for the jury commissioners who had served over a period of years, and the trial court refused to allow the clerk to issue the subpoenas. If the trial court erred, it was at that point. The defendant was represented by able counsel who had every opportunity to make his record on the point and bring it up on appeal. If he did so, the alleged error was finally litigated. If this was not done, then the alleged error was waived. (As a matter of fact, the question of permitting the jury commissioners to testify was dealt with and disposed of on the first appeal.) If the defendant could at this time take advantage of the alleged error, likewise he could now litigate any other alleged error such as might be alleged to have occurred in the selection of the jury and admission of evidence or in the giving of instructions.

We do not reach the question of the constitutionality of Act 419 of 1957, because constitutional questions are not decided unless the case cannot be disposed of on any other ground. Duncan v. Kirby, Ark., 311 S.W.2d 157, and cases cited therein.

Affirmed.

TRIAL PROCEDURE

Juries—Mississippi

Robert Lee GOLDSBY v. The STATE of Mississippi

Supreme Court of Mississippi, April 21, 1958, 102 So.2d 215.

SUMMARY: Goldsby, a Negro, was convicted of murder in a trial court in Mississippi. His conviction was affirmed by the Mississippi Supreme Court. 78 So.2d 762 (1955). Thereafter he petitioned the United States Supreme Court for a writ of certiorari, alleging for the first time a denial of equal protection of the laws in that Negroes had been systematically excluded from jury service in the county in which he was tried. The United States Supreme Court denied the petition. 350 U.S. 925 (1955). Goldsby then petitioned the Mississippi Supreme Court for leave to file a writ of error *coram nobis* on the grounds of newly-discovered evidence and the denial of his federal constitutional rights through the exclusion of Negroes from jury service. The court held, as to the denial of constitutional rights, that this issue was raised too late and further that there was no evidence of such systematic exclusion. 86 So.2d 27, 1 Race Rel. L. Rep. 565 (1956); *cert. denied*, 352 U.S. 944 (1957). Goldsby then petitioned in a federal court for a writ of habeas corpus on the ground that his conviction was in violation of the Due Process Clause of the Fourteenth Amendment. The district court dismissed the petition, apparently on the basis that the constitutional question had not been raised in the state courts at the trial. On appeal the Court of Appeals for the Fifth Circuit reversed, holding that Goldsby was entitled to a hearing on his petition because of his allegation that he was precluded, by ignorance and the speed of the trial, from raising the issue in the state court. 249 F.2d 417, 3 Race Rel. L. Rep. 66 (1957). On the remand, the district court dismissed the petition and remanded defendant to the custody of the superintendent of the Mississippi State Penitentiary. The attorney general then moved the Supreme Court of Mississippi to set a new date of execution. Defendant objected to the

motion on the ground that he was seeking to perfect an appeal from the district court's order. The court granted the motion of the attorney general and set a new date of execution on the ground that no appeal had been prosecuted and no restraining order obtained as required by the applicable sections of the U. S. code.

ROBERDS, Justice.

We have for consideration a motion of the Attorney General of Mississippi to set a new date for the execution of the respondent. Respondent objects to the motion on the ground that he is endeavoring to perfect an appeal from a judgment of the United States District Court for the Northern District of Mississippi, Greenville Division, which denied his application for a writ of habeas corpus and remanded him to the possession of the Superintendent of the penitentiary of the State of Mississippi.

According to the record before us this is the journey this litigation has taken.

In November 1954 respondent was convicted of murder in the Second Judicial District of Carroll County, Mississippi, and sentenced to death.

On March 28, 1955, this Court affirmed that judgment and sentence and set the date of execution for Friday, May 13, 1955. Goldsby v. State, 226 Miss. 1, 78 So.2d 762.

On May 11, 1955, an appeal was granted from that action by the Chief Justice of this Court, thereby, staying said execution.

On December 12, 1955, the Supreme Court of the United States denied certiorari. 350 U.S. 925, 76 S.Ct. 216, 100 L.Ed. 809.

On January 16, 1956, on motion made by the Attorney General of Mississippi, this Court again fixed the date of execution of respondent as Friday, February 24, 1956. 226 Miss. 1, 84 So.2d 528.

On February 21, 1956, respondent filed in this Court a petition for writ of error coram nobis, which petition this Court denied. 226 Miss. 1, 86 So.2d 27.

An appeal from that action was prosecuted to the Supreme Court of the United States and on December 10, 1956, that court denied the petition for writ of certiorari. 352 U.S. 944, 77 S.Ct. 266, 1 L.Ed.2d 239.

On January 7, 1957, on proper motion, this Court again set the date for the execution as Tuesday, February 12, 1957. Goldsby v. State, 226 Miss. 1, 91 So.2d 750.

Respondent then filed a petition in the United States District Court for the Northern District of Mississippi for a writ of habeas corpus. On July 29, 1957, Judge Allen Cox denied the petition and declined to issue a certificate of probable cause.

On February 8, 1957, a motion for stay of execution was heard by Judge Wayne G. Borah, United States Circuit Court of Appeals, Fifth Circuit, which motion was denied.

On February 11, 1957, the Honorable Earl Warren, Chief Justice of the Supreme Court of the United States, granted respondent a stay of execution "until petitioner has had opportunity to exhaust his federal rights in this proceeding."

An appeal was then perfected to the United States Circuit Court of Appeals, Fifth Circuit, from the foregoing order of Judge Allen Cox.

November 20, 1957, said Circuit Court of Appeals, United States ex rel. Goldsby v. Harpole, 5 Cir., 249 F.2d 417, remanded the cause to the United States District Court for the Northern District of Mississippi.

The matter was heard finally by Judge Claude F. Clayton, who had succeeded Judge Cox as District Judge, upon petition and proof. On April 3, 1958, the petition was dismissed by Judge Clayton and Goldsby was remanded to the custody of the Superintendent of the Mississippi State Penitentiary. Judge Clayton refused to issue a certificate of probable cause and the request of Goldsby for an appeal to the United States Circuit Court of Appeals, Fifth Circuit, was denied.

Section 2251, Title 28 U.S.C.A., provides that any judge or justice of the United States before whom a habeas corpus proceeding is pending may, pending an appeal, stay proceedings against any person detained in any state court or by or under authority of any state for any matter involved in the habeas corpus proceeding. If no stay is granted the state "proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending".

Section 2253, Title 28 U.S.C.A., provides that an appeal may be taken from a final order of a circuit or district judge in a habeas corpus proceeding but such appeal may not be taken "unless the justice or judge who rendered the order

or a circuit justice or judge issues a certificate of probable cause." In Sykes v. Peppersack, 4 Cir., 213 F.2d 871, 872, effort was made to prosecute an appeal from an order discharging a petition for writ of habeas corpus and remanding the petitioner to the custody of the warden of the penitentiary without obtaining a certificate of probable cause, as required by said Section 2253. The court said: "The appellant has failed to obtain, however, the certificate of probable cause required by 28 U.S.C. § 2253. The appeal will accordingly be dismissed".

Thus it is seen that no appeal has been prosecuted and no restraining order has been obtained. Under the circumstances we perceive that this court is not prohibited from, but is under a duty to, set another date for the execution of Goldsby. The motion so to do will be sustained and Thursday, May 29, 1958, is hereby set for the date of execution.

So ordered.

All Justices concur.

TRIAL PROCEDURE
Right to Counsel—Florida

Henry Grady ASBEY v. STATE of Florida

District Court of Appeal, Second District, Florida, April 30, 1958, 102 So.2d 407.

SUMMARY: Asbey, a Negro, was convicted of second degree murder and sentenced on a plea of guilty in the Criminal Court of Record for Polk County, Florida. On a motion to withdraw the plea of guilty, it was alleged that the accused was uneducated, confused and unfamiliar with court procedures and was required to plead without inquiry as to whether he was represented by counsel or advice as to his constitutional right to be tried by a jury. Asbey himself testified he thought the action of the grand jury amounted to a conviction and responded accordingly at the arraignment. The motion to withdraw was denied. The Court of Appeals, basing its decision on the "ignorance and confusion of the defendant," reversed the judgment and sentence and ordered the trial court to allow the accused to change his plea of guilty.

BIRD, JOHN U., Associate Judge.

This cause is before this Court on an appeal from the Court of Record from Polk County. The record indicates that the Defendant Henry Grady Asbey was indicted by the Grand Jury of Polk County for second degree murder and that the indictment was transferred to said Criminal Court of Record. On the 24th day of May, 1956 the County Solicitor filed an Information charging the Defendant with second degree murder. In the forenoon of June 4, 1956 the defendant was arraigned, pled guilty and in the afternoon of the same day was sentenced to serve thirty years in the State Prison. On June 25, 1956 D. C. Laird, as attorney for the defendant, filed a motion asking that the defendant be allowed to withdraw his plea of guilty and enter a plea of not guilty to the charge. The motion alleged that prior to the filing of the Information and the entry of the plea of guilty, the defendant had employed Mr. Laird to represent him in this case. That the attorney was not present at the arraignment, and that the accused did not advise the Court that he had employed counsel because he was not familiar with court procedure, was confused, ignorant and afraid, and that counsel had no knowledge of the fact that the Information had been filed or the arraignment was to be on that date. At the hearing of the Motion, defendant moved the Court to permit him to amend the Motion to allege that he was not guilty of the offense and desired a trial by jury. The Court denied the application to amend

and overruled the Motion. This Motion was not signed or sworn to by the defendant, but was both signed and sworn to by D. C. Laird, the attorney. At the hearing upon the Motion some testimony was taken from which it appeared that the defendant was a Negro, 35 years of age, with little or no education and entirely ignorant of court procedure and his Constitutional rights, having never been in court before; that the death of Sally Mae Asbey, the person who was alleged to have been killed, was accidental and that when he was arraigned he did not understand and thought that he had already been convicted by the Grand Jury. Section 909.-13, F.S.A., reads as follows:

> "909.13. The court may in its discretion at any time before sentence permit a plea of guilty to be withdrawn and, if judgment of conviction has been entered thereon, set aside such judgment, and allow a plea of not guilty, or, with the consent of the prosecuting attorney, allow a plea of guilty of a lesser included offense, or of a lesser degree of the offense charged, to be substituted for the plea of guilty."

It appears to us that the defendant was very ignorant and highly confused at the time of the entry of this plea. The record does not reflect that the accused was advised of his rights or that he was asked if he had or desired counsel or if he wished to be tried by jury, nor was he advised of the consequences and effect of a plea of guilty. In Cutts v. State, 54 Fla. 21, 45 So. 491, a capital case, it is said:

> "It has been the general practice in trial courts in this state when a party charged with felony has been brought to the bar for arraignment, to inquire of the accused whether he had counsel to represent him, and if, upon inquiry, it developed that he had no attorney and was unable to employ one, to ask the accused whether he desired one to represent him."

It is held in this case, however, that if the record fails to show whether the accused had counsel or not is no grounds for reversal unless it further appears that the right to have counsel was denied, and it is presumed that such right was not denied. In Johnson v. Mayo, Fla., 40 So.2d 134, 135, the Court said:

> "Through the courts of this state doubtless have the inherent power to appoint defense counsel in any criminal prosecution where such course seems proper in the interest of fairness and justice, there is no requirement under Florida law that counsel be furnished an insolvent defendant, except in a prosecution involving a capital offense. Johnson v. Mayo, 158 Fla. 264, 28 So.2d 585; Sec. 909.21, Florida Statutes, 1941, F.S.A. Such duty as may rest upon the Florida courts to furnish counsel in criminal cases less than capital arises by virtue of the Fourteenth Amendment to the United States Constitution, and it imposes no absolute requirement that counsel be furnished unless the accused is incapable of representing himself adequately at the trial on account of age, ignorance or lack of mental capacity. Whether any such incapacity exists is purely personal and is a factual issue which can be determined only by an examination and observation of the individual in question. Where a trier of the facts has made a finding on the issue his finding will not be disturbed if supported by competent credible evidence. Compare Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595; Wade v. Mayo, 334 U.S. 672, 68 S.Ct. 1270, 92 L.Ed. 1647."

For a full discussion of the necessity and advisability of the records showing affirmatively that the defendant was advised of his Constitutional rights of being represented by counsel and the right to be tried by jury should be set forth in the minutes or record of the trial. See Snead v. Mayo, Fla., 66 So.2d 865, wherein Mr. Justice Sebring outlines such requisites.

[*Plea Must Be Voluntary*]

In Pope v. State, 56 Fla. 81, 85, 47 So. 487, it is said that a plea of guilty should be entirely voluntary by one competent to know the consequences and should not be induced by fear, misapprehension, persuasion, promises, inadvertence or ignorance; and while the trial court may exercise discretion in permitting a plea of guilty to be withdrawn for the purpose of pleading not guilty, such discretion is subject to review by an Appellate Court, and that a defendant should be permitted to withdraw his plea of guilty when inadvertently or ignorantly entered and applica-

tion is duly made in good faith for such withdrawal.

The law favors trial on the merits and if the trial court abuses its discretion, the Appellate Court should interfere. Brown v. State, 92 Fla. 592, 109 So. 627; Artigas v. State, 140 Fla. 671, 192 So. 795.

In Collins v. State, Fla., 83 So.2d 6, it is said that the cases are legion that an application for leave to withdraw a plea of guilty and enter a plea of not guilty is within the sound judicial discretion of the trial judge to whom the application is directed, and cites Casey v. State, 116 Fla. 3, 156 So. 282 and La Barbera v. State, Fla., 63 So.2d 654, and that the burden of showing reversible error in the trial court's denial of the motion to withdraw such a plea rests upon the appellant.

In the instant case, it appears that this ignorant Negro, unfamiliar with court procedure, was brought before the court, the Information read to him, and he required to plead thereto without inquiry by anyone as to whether he was represented by or desired counsel or advised of his Constitutional right to be tried by jury and the consequence and effect of a plea of guilty. This motion to withdraw the plea of guilty filed in this case is not a perfect example of good pleading, yet when coupled with the motion to amend so as to allege that the defendant was not guilty and request for a trial by jury, is we think sufficient and the Court committed error in refusing to grant it. There is no contention made in this case and certainly none is found that the defendant was in any way imposed upon or any force or duress asserted at the arraignment. Our findings are purely upon the ignorance and confusion of the Defendant at that time and the omissions shown, it is therefore

The order and judgment of this court that the judgment and the sentence herein is reversed, with directions for the trial judge to enter an order granting a motion for leave to withdraw the plea of guilty and enter a plea of not guilty and proceed in accordance with this opinion.

Reversed.

KANNER, C. J., and SHANNON, J., concur.

TRIAL PROCEDURE
Sentencing—Michigan

Harold BUNCE et al. v. G. Mennen WILLIAMS

United States District Court, Eastern District, Michigan, Southern Division, February 20, 1958, 159 F.Supp. 325.

SUMMARY: Negro plaintiffs were convicted for violations of state statutes relating to illegal traffic in narcotics and were imprisoned. They brought suit in a Federal District Court against the Governor of the State of Michigan and the Attorney General to restrain them from enforcing state narcotic statutes, alleging that various Circuit Court Judges of Michigan had discriminated against defendants by giving less severe sentences to white persons found guilty of the same offenses. Application was made for a three-judge court. The district court dismissed, finding that there was no allegation that the named defendants had engaged in discriminatory conduct and, therefore, there was no substantial federal question to consider.

O'SULLIVAN, District Judge.

CHARACTER OF LITIGATION

The pleadings disclose the following situation: Plaintiffs are presently incarcerated in the State Prison of Southern Michigan, under sentences imposed by Circuit Judges of the State of Michigan, for violations of Michigan Statutes relating to illegal traffic in narcotic drugs. The Statute under which each of them was sentenced is Act 266 of the Public Acts of Michigan, 1952 (M.S.A.,

§ 18.1121-§ 18.1127,C.L.1948, § 335.151-§ 335.-157). Plaintiffs aver that their sentences were variously imposed under § 2 and § 3 of that Statute. None of the plaintiffs aver that they are innocent of the offenses set forth in the Statute, nor that the sentences imposed on them, respectively, were not within the permissible sentences provided by the Statute.

Plaintiffs aver that they are Negroes, and that various white persons sentenced for violations of the narcotic laws of Michigan were given less severe sentences than the plaintiffs herein and that these white persons, although guilty of the same offenses as the plaintiffs, were sentenced under a different Statute than that which was the basis for the sentences imposed upon these plaintiffs. They ask this Court's injunction to restrain the Governor of Michigan and his Attorney General "from presently and henceforth enforcing Public Act 266 of 1952" because, it is asserted, various Circuit Court Judges of Michigan have discriminated in favor of white persons found guilty of violation of the Narcotic Laws.

CONCLUSIONS OF LAW

Nowhere is it claimed that the sentences imposed upon these plaintiffs were unlawful, the burden of the complaint being that various Circuit Judges have been engaging in discriminatory practices in favor of certain white persons found guilty of the same offenses as those committed by these plaintiffs. It is not charged that the Governor of Michigan or his Attorney General has in the past engaged in any such alleged discriminatory practices. It is not charged that the Governor of Michigan or his Attorney General is about to, or has threatened to, make discriminatory use of the Statute under which these plaintiffs were sentenced. It is obvious that neither the Governor of Michigan nor the Attorney General has in any way participated in the alleged discriminatory conduct.

This Court, therefore, is of the opinion that it would be useless and improvident for a United States District Court to attempt to enjoin the Governor of Michigan or his Attorney General from doing something which neither of them has done, and which neither of them threatens or plans to do. The imposition of sentences under the criminal statutes of Michigan is not a function of the Governor of Michigan or of the Attorney General. The persons who imposed these sentences upon these plaintiffs, to wit: various Circuit Judges, and the person who now has custody of these plaintiffs, to wit: the Warden of the State Prison of Southern Michigan, are not before this Court.

This recital, however, should not be construed as indicating that were these last named persons parties to these proceedings, their conduct should be subject to this Court's injunction or that this Court would have any power, under the guise of an injunction, to change the sentences imposed upon these plaintiffs or to order their release from prison.

It is observed, also, that these plaintiffs do not claim to have sought relief in the State Courts of Michigan from the injustice they now aver.

RIGHT OF THIS JUDGE TO DISMISS THE ACTION

The plaintiffs rely on Section 2281 et seq., Title 28 United States Code Annotated, for the procedural propriety of their application. If the application presents a case requiring the composing of a court of three judges, it would be the duty of the signer of this Order, as a District Judge, to notify the Chief Judge of the Circuit, who would then designate two other judges to make up a three judge court. If such a court was thus composed, a single judge thereof would be without authority to dismiss the action, (§ 2284(5)).

It appears to be the rule, however, that the District Judge to whom the application is first made should dismiss the action without convening a three judge court where the application, on its face, fails to disclose a substantial Federal question.

In the case of California Water Service Co. v. City of Redding, 304 U.S. 252, 58 S.Ct. 865, 866, 82 L.Ed. 1323, the United States Supreme Court, in dealing with a situation not factually in point with the instant case, but involving the same principles, had this to say relating to the duty of a District Judge:

> "It is therefore the duty of a district judge, to whom an application for injunction restraining enforcement of a state statute or order is made, to scrutinize the bill of complaint to ascertain whether a substantial federal question is presented, as otherwise the provision for convening of a court of three judges is not applicable."

A case alike in principle with the one before this Court was brought before the Court of Appeals for the Seventh Circuit in the case of Haines v. Castle, 226 F.2d 591, 594. In that case, plaintiff, imprisoned in the Illinois State Penitentiary, sought to enjoin enforcement of certain Statutes of the State of Illinois, and proceeded under Title 28 United States Code Annotated, Sections 2281 and 2284. As in the instant case, defendants moved to dismiss the suit on the ground that it tendered no substantial Federal question. The District Court dismissed the case without convening a three judge court. The plaintiff there did not first resort to the courts of the State of Illinois to test the validity of the Statute in question. Such is the situation in this case. In affirming the action of the District Judge, the Court of Appeals said:

> "No substantial federal question was presented and the District Court correctly dismissed the suit. Under such circumstances a single judge may dismiss. California Water Service Co. v. City of Redding, 304 U.S. 252, 58 S.Ct. 865, 82 L.Ed. 1323."

This Court's scrutiny of the present application leads him to the conclusions that it presents no substantial Federal question.

ORDER

Now, therefore, the motion of the defendants to dismiss plaintiffs' application may be, and it is, hereby granted; and said cause is, accordingly, dismissed.

EDUCATION
Public Schools—Massachusetts

The Massachusetts Legislature approved a concurrent resolution on March 10, 1958, urging the President and Congress "to enact and enforce legislation" implementing the *School Segregation Cases*.

RESOLUTIONS memorializing the Congress and the President of the United States to enact and enforce legislation to implement the decisions of the Supreme Court of the United States outlawing segregation in the public school system.

Whereas, The Supreme Court of the United States on the seventeenth day of May, nineteen hundred and fifty-four, by unanimous decision held that "in the field of public education the doctrine of separate but equal has no place"; and

Whereas, The same court expressed its desire that its decision should be complied with "with all deliberate speed"; and

Whereas, The Fourteenth Amendment to the Constitution of the United States provides that no state shall deny to any person within its jurisdiction equal protection of the laws; and

Whereas, The interests of orderly government demand that respect and compliance be given to orders issued by courts possessed of jurisdiction of persons and subject matter; therefore, be it

Resolved, That the General Court of Massachusetts respectfully urges the Congress and President of the United States to enact and enforce legislation to implement the decisions of the Supreme Court of the United States outlawing segregation in the public school system; and be it further

Resolved, That the Secretary of the Commonwealth transmit forthwith copies of these resolutions to the President of the United States, to the presiding officer of each branch of the Congress of the United States, and to each member thereof from this Commonwealth.

House of Representatives, adopted, March 4, 1958

LAWRENCE R. GROVE, Clerk

Senate, adopted in concurrence, March 10, 1958

IRVING N. HAYDEN, Clerk

EDUCATION
Public Schools—Virginia

Chapter 642 of the 1958 Session of the Virginia General Assembly, approved April 7, 1958, continues the limitations contained in Chapter 71 of the 1956 Extra Sessions Acts, (1 Race Rel. L. Rep. 1111), limiting the application of funds to "efficient" elementary and secondary schools. "Efficient" schools are defined as those in which there is no racial integration. Following is the portion of the Act dealing with this limitation.

DEPARTMENT OF EDUCATION
STATE BOARD OF EDUCATION

The General Assembly declares, finds and establishes as a fact that the mixing of white and colored children in any elementary or secondary public school within any county, city or town of the Commonwealth constitutes a clear and present danger affecting and endangering the health and welfare of the children and citizens residing in such county, city or town, and that no efficient system of elementary and secondary public schools can be maintained in any county,

city or town in which white and colored children are taught in any such school located therein.

An efficient system of elementary public schools means and shall be only that system within each county, city or town in which no elementary school consists of a student body in which white and colored children are taught.

An efficient system of secondary public schools means and shall be only that system within each county, city or town in which no secondary school consists of a student body in which white and colored children are taught.

The General Assembly, for the purpose of protecting the health and welfare of the people and in order to preserve and maintain an efficient system of public elementary and secondary schools, hereby declares and establishes it to be the policy of the Commonwealth that no public elementary or secondary schools in which white and colored children are mixed and taught shall be entitled to or shall receive any funds from the State Treasury for their operation, and, to that end, forbids and prohibits the expenditure of any part of the funds appropriated by Items 137, 138, 141, 142, and 147 of this section for the establishment and maintenance of any system of public elementary or secondary schools, which is not efficient.

The appropriations made by Items 137, 138, 141, 142, and 147 of this section shall be deemed to be appropriated separately to the counties and cities and the funds made available and apportioned to the counties and cities severally and separately by the Department of Education and the State Board of Education shall be separately subject to the limitations imposed in this section for their use, which limitations and a strict observance thereof shall be a condition precedent to their use.

For the purposes of this section and all other applicable laws, the public schools of the counties, cities, and towns shall consist of two separate classes, namely, elementary and secondary schools.

Notwithstanding any other provisions of this Chapter or the provisions of any other law, whenever the student body in any elementary or secondary public school shall consist of both white and colored children, the Department of Education, the State Board of Education, the State Comptroller, the State Treasurer, local school board, local treasurer, and any officer of the State or of any county or city who has power to distribute or expend any of the funds appropriated by Items 137, 138, 141, 142 and 147, each severally and collectively, are directed and commanded to refrain immediately from paying, allocating, transferring or in any manner making available to any county, city or town in which such school is located any part of the funds appropriated in Items 137, 138, 141, 142, and 147 for the maintenance of any public school of the class of the school in which white and colored children are taught. Whenever it is made to appear to the Governor, and he so certifies to the Department of Education, that all such schools of such class within any such county, city or town can be maintained and operated without white and colored children being mixed or taught therein, the funds appropriated in Items 137, 138, 141, 142, and 147 to such county or city shall be made available, subject to the limitations contained herein and only for such period of time as it is made to appear to the Governor that there is no school of that class being operated in such county, city or town, in which white and colored children are mixed and taught, provided that all the limitations herein contained shall again be effective immediately whenever it appears that any children are being mixed and taught in any public school of the class involved.

It is provided that the limitations herein set forth shall not prohibit the release and distribution of the funds apportioned and allocated, or any unexpended part thereof, to which any county, city or town would otherwise be entitled, to such county, city or town for the payment of salaries and wages of unemployed teachers in State aid teaching positions, and other public school employees, who are under contract and for educational purposes which may be expended in furtherance of elementary and secondary education of Virgina students in nonsectarian private schools, as may be provided by law.

* * *

EDUCATION

"Co-operatives"—Louisiana

Act No. 257 (House Bill No. 943) of the 1958 regular session of the Louisiana Legislature,

approved July 2, 1958, allows the establishment of "educational co-operatives" to provide primary and secondary educational facilities, and enumerates their powers, duties and liabilities.

AN ACT to provide for the establishment of educational cooperatives; to define their powers, duties, and liabilities: and to repeal all laws in conflict herewith.

Be it enacted by the Legislature of Louisiana:

Section 1. This Act shall be known and may be referred to by the short title: "Educational Cooperative Law."

Section 2. Cooperative, nonprofit membership corporations may be organized under this Act for the purpose of conducting private elementary or secondary schools or educational facilities.

Section 3. As used in this Act:

A. "Cooperative" means a corporation organized under this Act and a corporation which becomes subject to this Act in the manner hereinafter provided.

B. "Member" means each incorporator of a cooperative and each person admitted to and retaining membership therein, and shall include a husband and wife admitted to joint membership.

C. "Person" includes any natural person, firm, association, corporation, business trust, partnership, state or political subdivision or agency thereof, or any body politic.

Section 4. A cooperative may:

(1) Sue and be sued, in its corporate name;

(2) Have existence for a period of not more than ninety-nine years;

(3) Adopt a corporate seal and alter the same at pleasure;

(4) Plan, acquire, offer and provide all types of elementary and secondary educational services;

(5) Plan, acquire, offer and provide all types of educational facilities necessary and offer, sell and issue notes, bonds, and other evidences of indebtedness;

(6) Make loans to persons to whom Educational Services will be supplied by the cooperative for the purpose of, and otherwise assist such persons in constructing, maintaining and operating educational facilities;

(7) Become a member in one or more other cooperatives or corporations or own stock therein;

(8) Construct, purchase, take, receive, lease as lessee, or otherwise acquire, and own, hold, use, equip, maintain, and operate, and sell, assign, transfer, convey, exchange, lease as lessor, mortgage, pledge, or otherwise dispose of or encumber all types of educational facilities, including transportation facilities and any and all kinds of classes of real or personal property whatsoever, which shall be deemed necessary, convenient or appropriate to accomplish the purpose for which the cooperative is organized;

(9) Purchase or otherwise acquire, and own, hold, use and exercise and to sell, assign, transfer, convey, mortgage, pledge, hypothecate, or otherwise dispose of or encumber, franchises, rights, privileges, licenses, rights of way and easements;

(10) Borrow money and otherwise contract indebtedness and to issue notes, bonds, and other evidences of indebtedness therefore, and secure the payment thereof by mortgage, pledge, deed of trust, or any other encumbrance upon any or all of its then owned or after-acquired real or personal property, assets, franchises, revenues or income;

(11) Construct, maintain and operate educational facilities, subject, however, to the requirements that are imposed by health and safety laws of this state;

(12) Conduct its business and exercise any or all of its powers within or without this state;

(13) Adopt, amend and repeal by-laws; and

(14) Do and perform any and all other acts and things, and to have and exercise any and all other powers which may be necessary, convenient or appropriate to accomplish the purpose for which the cooperative is organized.

Section 5. The name of each cooperative shall include the words "Educational" and "Cooperative," and the abbreviation "Inc.,". The name of a cooperative shall distinguish it from the name of any other corporation organized under the laws of, or authorized to transact business in, this state. The words "Educational" and "Cooperative" shall not both be used in the name of any corporation organized under the laws of, or authorized to transact business in,

this state, except a cooperative or a corporation transacting business in this state pursuant to the provisions of this Act.

Section 6. Five or more natural persons, or two or more cooperatives, may organize a cooperative in the manner hereinafter provided.

Section 7. A. The articles of incorporation of a cooperative shall recite in the caption that they are executed pursuant to this Act. The articles shall be executed by authentic act, signed by each of the incorporators, and shall state:

(1) The name of the cooperative:
(2) The address of its principal office:
(3) The names and addresses of the incorporators.
(4) The names and addresses of the persons who shall constitute its first board of directors;
(5) Its duration; and
(6) Any provisions not inconsistent with this Act deemed necessary or advisable for the conduct of its business and affairs.

B. The articles of incorporation shall be submitted to the Secretary of State for filing as provided in this Act.

C. It shall not be necessary to set forth in the articles of incorporation of a cooperative the purpose for which it is organized or any of the corporate powers.

Section 8. The original by-laws of a cooperative shall be adopted by its board of directors. The first by-laws of a new cooperative resulting from a consolidation, or the surviving cooperative resulting from a merger or the converted corporation resulting from a conversion, as provided in this Act, shall be adopted by the board of directors named in articles of conversion, merger or consolidation, as the case may be. Thereafter by-laws shall be adopted, amended or repealed by its members. The by-laws shall set forth the rights and duties of members and directors and may contain other provisions for the regulation and management of the affairs of the cooperative not inconsistent with this Act or with its articles of incorporation.

Section 9. A. No person who is not an incorporator shall become or remain a member of a cooperative unless such person is the parent, tutor or guardian of, or the person standing in loco parentis to, a child or children using the educational services and/or facilities furnished by the cooperative or a child or children who have used such facilities within the preceding two (2) years. The by-laws may provide that any person, including an incorporator, shall cease to be a member thereof, unless a child or children of whom he is the parent, tutor or guardian, or the person standing in loco parentis, makes use of the educational services or facilities of the cooperative within a specified time after such person has become a member thereof.

B. An annual meeting of the members shall be held at such time as provided in the by-laws.

C. Special meetings of the members shall be called by the board of directors, by any three directors, by not less than ten per centum of the members, or by the president.

D. Meetings of members shall be held at such place as may be provided in the by-laws. In the absence of any such provision, all meetings shall be held in the city or town in which the principal office of the cooperative is located.

E. Except as hereinafter otherwise provided, written or printed notice stating the time and place of each meeting of members and, in the case of a special meeting, the purpose or purposes for which the meeting is called, shall be given to each member, either personally or by mail, not less than ten or more than twenty-five days before the date of the meeting.

F. Five per centum of all members, present in person, shall constitute a quorum for the transaction of business at all meetings of the members, unless the by-laws prescribe the presence of a greater percentage of the members for a quorum. If less than a quorum is present at any meeting, a majority of those present in person may adjourn the meeting from time to time without further notice.

G. Each member shall be entitled to one vote on each matter submitted to a vote at a meeting. Voting shall be in person, but, if the by-laws so provide, may also be by proxy or by mail, or both. If the by-laws provide for voting by proxy or by mail, they shall also prescribe the conditions under which proxy or mail voting shall be exercised. In any event, only members may act as proxies and no member may act as proxy for more than three members at any meeting of the members.

Section 10. A. The business and affairs of a cooperative shall be managed by a board of not less than five directors, each of whom shall be a member of the cooperative or of another co-

operative which shall be a member thereof. The by-laws shall prescribe the number of directors, their qualifications, other than those provided for in this Act, the manner of holding meetings of the board of directors and of the election of successors to directors who shall resign, die, or otherwise be incapable of acting. The by-laws may also provide for the removal of directors from office and for the election of their successors. Without approval of the members, directors shall not receive any salaries for their services as directors. However, directors may not be employed by the cooperative in any capacity involving compensation. The by-laws may, however, provide that a fixed fee and expenses of attendance, if any, may be allowed to each director for attendance at each meeting of the board of directors.

B. The directors of a cooperative named in any articles of incorporation, consolidation, merger or conversion, as the case may be, shall hold office until the next following annual meeting of the members or until their successors shall have been elected and qualified. At each annual meeting or, in case of failure to hold the annual meeting as specified in the by-laws, at a special meeting called for that purpose, the members shall elect directors to hold office until the next following annual meeting of the members, except as hereinafter otherwise provided. Each director shall hold office for the term for which he is elected or until his successor has been elected and qualified.

C. The by-laws may provide that, in lieu of electing the whole number of directors annually, the directors shall be divided into two classes at the first or any subsequent annual meeting, each class to be as nearly equal in number as possible, with the term of office of the directors of the first class to expire at the next succeeding annual meeting and the term of the second class to expire at the second succeeding annual meeting. At each annual meeting after such classification a number of directors equal to the number of the class whose term expired at the time for such meeting shall be elected to hold office until the second succeeding annual meeting.

D. A majority of the board of directors shall constitute a quorum.

E. If a husband and wife hold a joint membership in a cooperative, either one, but not both, may be elected as director.

F. The board of directors may exercise all of the powers of a cooperative except such as are conferred upon the members by this Act, or its articles of incorporation or by-laws.

Section 11. Notwithstanding any other provision of this Act, or any other statute, the by-laws may provide for the division and redivision of the territory served or to be served by a cooperative into two or more districts. In such case the by-laws shall prescribe the manner in which the several districts shall function with respect to the nomination and election of directors and otherwise, and may provide for the election and powers of district delegates. No member at any district meeting and no district delegate at any meeting shall vote by proxy or by mail.

Section 12. The officers of a cooperative shall consist of a president, vice-president, secretary and treasurer, who shall be elected annually by and from the board of directors. No person shall continue to hold any of the above offices after he has ceased to be a director. The offices of secretary and of treasurer may be held by the same person. The board of directors may also elect or appoint such other officers, agents, or employees as it shall deem necessary or advisable and shall prescribe the powers and duties thereof. Any officer may be removed from office and his successor elected in the manner prescribed in the by-laws.

Section 13. A cooperative may amend its articles of incorporation by complying with the following requirements:

(1) The proposed amendment shall be approved first by the board of directors and shall be submitted then to a vote of the members at any annual or special meeting thereof, the notice of which shall set forth the proposed amendment. The proposed amendment, with such changes as the members shall choose to make therein, shall be deemed to be approved on the affirmative vote of not less than two thirds of those members voting thereon at such meeting; and

(2) Upon such approval by the members, articles of amendment shall be executed by authentic act on behalf of the cooperative by its president or vice-president and its corporate seal shall be affixed thereto and attested by its secretary. The articles of amendment shall recite in the caption that they are executed pursuant to this Act and shall state:

(a) The name of the cooperative;
(b) The address of its principal office;
(c) The date of the filing of its articles of incorporation in the office of the Secretary of State; and
(d) The amendment to its articles of incorporation.

(3) The president or vice-president executing such articles of amendment shall also make and annex thereto an affidavit stating that the provisions of this Section were duly complied with. Such articles of amendment and affidavit shall be submitted to the Secretary of State for filing as approved in this Act.

B. A cooperative may, without amending its articles of incorporation, upon authorization of its board of directors, change the location of its principal office by filing a certificate of change of principal office, executed and acknowledged by its president or vice-president under its seal attested by its secretary, in the office of the Secretary of State, and also in the office of the recorder of mortgages or the clerk of court in each parish in which its articles of incorporation or any prior certificate of change of principal office of such cooperative has been filed. Such cooperative shall also, within thirty (30) days after the filing of such certificate of change of principal office in the office of recorder of mortgages or clerk of court of any parish, file therein certified copies of its articles of incorporation and all amendments thereto, if the same are not already on file therein.

Section 14. Any two or more cooperatives, each of which is hereinafter designated, a "consolidating cooperative," may consolidate into a new cooperative, hereinafter designated the "new cooperative," by complying with the following requirements:

A. The proposition for the consolidation of the consolidating cooperative into the new cooperative and proposed articles of consolidation to give effect thereto shall be first approved by the board of directors of each consolidating cooperative. The proposed articles of consolidation shall recite in the caption that they are executed pursuant to this Act and shall state:

(1) The name of each consolidating cooperative, the address of its principal office, and the date of the filing of its articles of incorporation in the office of the Secretary of State;

(2) The name of the new cooperative and address of its principal office;

(3) The names and addresses of the persons who shall constitute the first board of directors of the new cooperative;

(4) The terms and conditions of the consolidation and the mode of carrying the same into effect, including the manner and basis of converting memberships in each consolidating cooperative into membership in the new cooperative and the issuance of certificates of membership in respect of such converted memberships; and

(5) Any provisions not inconsistent with this Act deemed necessary or advisable for the conduct of the business and affairs of the new cooperative.

B. The proposition for the consolidation of the consolidating cooperatives into the new cooperative and the proposed articles of consolidation approved by the board of directors of each consolidating cooperative then shall be submitted to a vote of the members thereof at any annual or special meeting thereof, the notice of which shall set forth particulars concerning the proposed consolidation. The proposed consolidation and the proposed articles of consolidation shall be deemed to be approved upon the affirmative vote of not less than two thirds of those members of each consolidating cooperative voting thereon at such meeting.

C. Upon such approval by the members of the respective consolidating cooperatives, articles of consolidation in the form approved shall be executed by authentic act on behalf of each consolidating cooperative by its president or vice-president and its seal shall be affixed thereto and attested by its secretary. The president or vice-president of each consolidating cooperative executing such articles of consolidation shall also make and annex thereto an affidavit stating that the provisions of this Section were duly complied with by such cooperative. Such articles of consolidation and affidavits shall be submitted to the Secretary of State for filing as provided in this Act.

Section 15. Any one or more cooperatives, each of which is hereinafter designated a "merging cooperative," may merge into another cooperative, hereinafter designated the "surviving

cooperative," by complying with the following requirements:

A. The proposition for the merger of the merging cooperatives in the surviving cooperative and proposed articles of merger to give effect thereto shall be first approved by the board of directors of each merging cooperative and by the board of directors of the surviving cooperative. The proposed articles of merger shall recite in the caption that they are executed pursuant to this Act and shall state:

(1) The name of each merging cooperative, the address of its principal office, and the date of the filing of its articles of incorporation in the office of the Secretary of State;

(2) The name of the surviving cooperative and the address of its principal office;

(3) The names and addresses of the persons who shall constitute the first board of directors of the surviving cooperative;

(4) A statement that the merging cooperatives elect to be merged into the surviving cooperative;

(5) The terms and conditions of the merger and mode of carrying the same into effect, including the manner and basis of converting the memberships in the merging cooperative or cooperatives into memberships in the surviving cooperative and the issuance of certificates of membership in respect of such converted membership; and

(6) Any provisions not inconsistent with this Act deemed necessary or advisable for the conduct of the business and affairs of the surviving cooperative.

B. The proposition for the merger of the merging cooperatives into the surviving cooperative and the proposed articles of merger approved by the board of directors of the respective cooperatives, parties to the proposed merger, then shall be submitted to a vote of the members of each such cooperative at any annual or special meeting thereof, the notice of which shall set forth full particulars concerning the proposed merger. The proposed merger and the proposed articles of merger shall be deemed to be approved upon the affirmative vote of not less than two-thirds of those members of each cooperative voting thereon at such meeting.

C. Upon such approval by the members of the respective cooperatives, parties to the proposed merger, articles of merger in the form approved shall be executed by authentic act on behalf of each such cooperative by its president or vice-president and its seal shall be affixed thereto and attested by its secretary. The president or vice-president of each cooperative executing such articles of merger shall also make and annex thereto an affidavit stating that the provisions of this Section were duly complied with by such cooperative. Such articles of merger and affidavit shall be submitted to the Secretary of State for filing as provided in this Act.

Section 16. The effect of consolidation or merger shall be:

A. The several cooperatives, parties to the consolidation or merger, shall be a single cooperative which, in the case of a consolidation, shall be the new cooperative provided for in articles of consolidation, and in the case of a merger, shall be that cooperative described in the articles of merger as the surviving cooperative, and the separate existence of all cooperatives, parties to the consolidation or merger, except the new or surviving cooperative, shall cease.

B. The new or surviving cooperative shall have all the rights, privileges, immunities and powers and shall be subject to all the duties and liabilities of a cooperative organized under the provisions of this Act, and shall possess all the rights, privileges, immunities and franchises, as well of a public as of a private nature, and all property, real and personal, application for membership, all debts due on whatever account, and all other choses in action, of each of the consolidating or merging cooperatives, and furthermore all and every interest of, or belonging to or due to, each of the cooperatives so consolidated or merged, shall be taken and deemed to be transferred to and vested in such new or surviving cooperative without further act or deed; and the title to any real estate or any interest therein, under the laws of this state vested in any such cooperatives shall not revert or be in any way impaired by reason of such consolidation or merger.

C. The new or surviving cooperative shall thence forth be responsible and liable for all of the liabilities and obligations of each of the cooperatives so consolidated or merged, and any claim existing, or action or proceeding pending, by or against any of such cooperatives may be prosecuted as if such consolidation or merger

had not taken place, but such new or surviving cooperative may be substituted in its place.

D. Neither the rights of creditors nor any liens upon the property of any of such cooperatives shall be impaired by such consolidation or merger.

E. In the case of a consolidation, the articles of consolidation shall be deemed to be the articles of incorporation of the new cooperative; and in the case of merger, the articles of incorporation of the surviving cooperative shall be deemed to be amended to the extent, if any, that changes therein are provided for in the articles of merger.

Section 17. Any corporation under the laws of this state for the purpose, among others, of providing educational services and facilities, may be converted into a cooperative and become subject to this Act with the same effect as if originally organized under this Act by complying with the following requirements:

A. The proposition for the conversion of such corporation into a cooperative and proposed articles of conversion to give effect thereto shall be first approved by the board of directors of such corporation. The proposed articles of conversion shall recite in the caption that they are executed pursuant to this Act and shall state:

(1) The name of the corporation prior to its conversion into a cooperative.

(2) The address of the principal office of such corporation;

(3) The date of the filing of the articles of incorporation of such corporation in the office of the Secretary of State;

(4) The statute or statutes under which such corporation was organized;

(5) The name assumed by such corporation;

(6) A statement that such corporation elects to become a cooperative, subject to this Act;

(7) The names and addresses of the persons who shall constitute the first board of directors of the converted corporation upon filing of the articles of conversion;

(8) The manner and basis of converting memberships in or shares of stock of such corporation into memberships therein after completion of the conversion; and

(9) Any provisions not inconsistent with this Act deemed necessary or advisable for the conduct of the business and affairs of such corporation.

B. The proposition for the conversion of such corporation into a cooperative and the proposed articles of conversion approved by the board of directors of such corporation shall then be submitted to a vote of the members or stockholders, as the case may be, of such corporation at any duly held annual or special meeting thereof, the notice of which shall set forth all particulars concerning the proposed conversion. The proposition for the conversion of such corporation into a cooperative and the proposed articles of conversion, with such amendments thereto as the members or stockholders of such corporation shall choose to make, shall be deemed to be approved upon the affirmative vote of not less than two-thirds of those members of such corporation voting thereon at such meeting, or, if such corporation is a stock corporation, upon the affirmative vote of the holders of not less than two-thirds of the capital stock of such corporation represented at such meeting.

C. Upon such approval by the members or stockholders of such corporation, articles of conversion in the form approved by such members or stockholders shall be executed by authentic act on behalf of such corporation by its president or vice-president and its corporate seal shall be affixed thereto and attested by its secretary. The president or vice-president executing such articals of conversion on behalf of such corporation shall also make and annex thereto an affidavit stating that the provisions of this Section with respect to the approval of its trustees or directors and its members or stockholders of the proposition for the conversion of such corporation into a cooperative and such articles of conversion were duly complied with. Such articles of conversion and affidavit shall be submitted to the Secretary of State for filing as provided in this Act. The term "articles of incorporation" as used in this Act shall be deemed to include the articles of conversion of a converted corporation.

Section 18. Notwithstanding any other provision of this Act, any proposition embodied in a petition signed by not less than ten per centum of the members of a cooperative, together with any document submitted with such petition to give effect to its proposition, shall be submitted to the members of a cooperative, either at a

special meeting of the members held within forty-five days after the presentation of such petition, or, if the date of the next annual meeting of members falls within ninety days after such presentation, or if the petitioner so requests, at such annual meeting. The approval of the board of directors shall not be required in respect of any proposition or document submitted to the members pursuant to this Section and approved by them, but such proposition or document shall be subject to all other applicable provisions of this Act. Any affidavit or affidavits required to be filed with any such document pursuant to applicable provisions of this Act shall, in such cases, be modified to show compliance with the provisions of this Section.

Section 19. A cooperative which has not commenced business may dissolve voluntarily by delivering to the Secretary of State articles of dissolution, executed and acknowledged on behalf of the cooperative by a majority of the incorporators. The articles of dissolution shall be submitted to the Secretary of State for filing as provided in this Act. The articles of dissolution shall state:

(1) The name of the cooperative;
(2) The address of its principal office;
(3) The date of its incorporation;
(4) That the cooperative has not commenced business;
(5) That the amount, if any, actually paid in account of membership fees, less any part thereof disbursed for necessary expenses, has been returned to those entitled thereto and that all servitudes have been released to the grantors;
(6) That no debt of the cooperative remains unpaid; and
(7) That a majority of the incorporators elect that the cooperative be dissolved.

B. A cooperative which has commenced business may dissolve voluntarily and liquidate its affairs in the following manner:

(1) The board of directors shall first recommend that the cooperative be dissolved voluntarily and thereafter the proposition that the cooperative be dissolved shall be submitted to the members of the cooperative at any annual or special meeting the notice of which shall set forth such proposition. The proposed voluntary dissolution shall be deemed to be approved upon the affirmative vote of not less than two-thirds of those members voting thereon at such meeting;

(2) Upon such approval, a certificate of election to dissolve, hereinafter designated as the "certificate" shall be executed by authentic act on behalf of the cooperative by its president or vice-president and its corporate seal shall be affixed thereto and attested by its secretary. The certificate shall state:

(a) The name of the cooperative;
(b) The address of its principal office;
(c) The names and addresses of its directors; and
(d) The total number of members of the cooperative and the number of members who voted for and against the voluntary dissolution of the cooperative. The president or vice-president executing the certificate shall also make an annex thereto an affidavit stating that the provisions of this Sub-section were duly complied with. Such certificate and affidavit shall be submitted to the Secretary of State for filing as provided in this Act.

(3) Upon the filing of the certificate and affidavit by the Secretary of State, the corporative shall cease to carry on its business except in so far as may be necessary for winding up thereof, but its corporate existence shall continue until articles of dissolution have been filed by the Secretary of State;

(4) After filing of the certificate and affidavit by the Secretary of State the board of directors shall immediately cause notice of the liquidation proceedings to be mailed to each known creditor and claimant and to be published once a week for two successive weeks in a newspaper of general circulation in the parish in which the principal office of the cooperative is located;

(5) The board of directors shall have full power to liquidate and settle the affairs of the cooperative and shall proceed to collect the debts owing to the cooperative, convey and dispose of its property and assets, pay, satisfy, and discharge its debts,

obligations and liabilities, and do all other things required to liquidate its business and affairs, and after paying or adequately providing for the payment of all its debts, obligations and liabilities, shall distribute the remainder of its property and assets among its members;

(6) When all debts, liabilities and obligations of the cooperative have been paid and discharged or adequate provision shall have been made therefore, and all of the remaining property and assets of the cooperative shall have been distributed pursuant to the provisions of this Section, the board of directors shall authorize the execution of articles of dissolution which shall thereupon be executed and acknowledged on behalf of the cooperative by its president or vice-president, and its corporate seal shall be affixed thereto and attested by its secretary. Such articles of dissolution shall recite in the caption that they are executed pursuant to this Act and shall state:

(a) The name of the cooperative;

(b) The address of the principal office of the cooperative;

(c) That the cooperative has heretofore delivered to the Secretary of State a certificate of election to dissolve and the date on which the certificate was filed by the Secretary of State in the records of his office;

(d) That all debts, obligations and liabilities of the cooperative have been paid and discharged or that adequate provisions have been made therefor;

(e) That all the remaining property and assets of the cooperative have been distributed among the members in accordance with the provisions of this Section; and

(f) That there are no actions or suits pending against the cooperative. The president or vice-president executing the articles of dissolution shall also make and annex thereto an affidavit stating that the provisions of this Subsection were duly complied with. Such articles of dissolution and affidavit accompanied by proof of publication required in this Subsection, shall be submitted to the Secretary of State for filing as provided in this Act.

Section 20. Articles of incorporation, amendment, consolidation, merger, conversion or dissolution, as the case may be, when executed by authentic act shall be presented to the Secretary of State for filing in the records of his office. If the Secretary of State shall find that the articles presented conform to the requirements of this Act, he shall, upon the payment of the fees as in this Act provided, file the articles so presented in the records of his office and upon such filing the incorporation, amendment, consolidation, merger, conversion, or dissolution provided for therein shall be in effect. The Secretary of State immediately upon filing in his office of any articles pursuant to this Act shall transmit a certified copy thereof to the recorder of mortgages or clerk of court of the parish in which the principal office of each cooperative or corporation affected by such incorporation, amendment, consolidation, merger, conversion or dissolution shall be located. The recorder of mortgages or clerk of court of any parish upon receipt of any such certified copy, shall file and index the same in the records of his office, but the failure of the Secretary of State or of the recorder of mortgages or clerk of court of the parish to comply with the provisions of this Section shall not invalidate such articles. The provisions of this Section shall also apply to certificates of election to dissolve and affidavits of compliance executed pursuant to Section 19 (b).

Section 21. A. Revenues of a cooperative for any fiscal year shall first be used to:

(1) Defray expenses of the cooperative and of the operation and maintenance of its facilities during such fiscal year;

(2) Pay interest and principal of obligations of the cooperative coming due in such fiscal year;

(3) Finance, or to provide a reserve for the financing of, the construction or acquisition by the cooperative of additional facilities to the extent determined by the board of directors;

(4) Provide a reasonable reserve for working capital;

(5) Provide a reserve for the payment of indebtedness of the cooperative maturing more than one (1) year after the date

of the incurrence of such indebtedness in an amount not less than the total of the interest and payments in respect thereof required to be made during the next following fiscal year; and

(6) Provide a fund for education in cooperation and for the dissemination of information concerning the services made available by the cooperative.

B. Nothing herein contained shall be construed to prohibit the payment by a cooperative of all or any part of its indebtedness prior to the date when the same shall become due.

Section 22. A cooperative may not sell, mortgage, lease or otherwise dispose of or encumber all or any substantial portion of its property unless such sale, mortgage, lease or other disposition or encumbrance is authorized at a duly held meeting of the members thereof by the affirmative vote or not less than a majority of all of the members of the cooperative. However, notwithstanding anything herein contained, or any other provisions of law,

(1) The board of directors may sell, lease or otherwise dispose of all or a substantial portion of such property to another cooperative authorized to transact business in the state pursuant to this Act upon the authorization of a majority of those members of the cooperative present at a duly held meeting of the members thereof and

(2) The board of directors of the cooperative, without authorization by the members thereof, shall have full power and authority to authorize the execution and delivery of a mortgage or mortgages or a deed or deeds of trust upon, or the pledging or encumbering of, any or all of the property, assets, rights, privileges, licenses, franchises and permits of the cooperative, whether acquired or to be acquired, and wherever situated, as well as the revenues and income therefrom, all upon such terms and conditions as the board of directors shall determine, to secure any indebtedness of the cooperative to the State of Louisiana or any instrumentality or agency thereof.

Section 23. The private property of the members of a cooperative shall be exempt from execution for the debts of the cooperative and no member shall be liable or responsible for any debts of the cooperative.

Section 24. Notwithstanding the provisions of any other Act, upon the recordation as a mortgage on real property of any mortgage, deed of trust, or other instrument executed by a cooperative, which, by its terms creates a lien upon both real and personal property then owned or after-acquired, the lien thereof shall attach to all property of such cooperative then owned, described in such mortgage, deed of trust or other instrument and to all after-acquired property described therein immediately upon the acquisition thereof by such cooperative and the lien so created shall be superior to all claims of creditors of such cooperative and purchasers of such property and to all other liens affecting such property, except liens of prior record.

Section 25. Whenever any notice is required to be given under the provisions of this Act or under the provisions of the articles of incorporation or by-laws of a cooperative, waiver thereof in writing, signed by the person or persons entitled to such notice, shall be deemed equivalent to such notice. If a person or persons entitled to notice of a meeting attends such meeting, such attendance shall constitute a waiver of notice of the meeting, except in case the attendance is for the express purpose of objecting to the transaction of any business because the meeting has not been lawfully called or convened.

Section 26. Each cooperative shall pay annually, on or before the first day of October, to the department of revenue, a fee of ten dollars for each one hundred persons or fraction thereof to whom educational services are supplied within the state by it, but shall be exempt from all other excise and income taxes whatsoever.

Section 27. The provisions of Part X of Chapter 2 of Title 51 shall not apply to any note, bond or other evidence of indebtedness issued by any cooperative pursuant to this Act to the State of Louisiana or any agency or instrumentality thereof, or to any mortgage or deed of trust executed to secure the same. The provisions of said Act shall not apply to the issuance of membership certificates by any cooperative.

Section 28. This Act shall be construed liberally. The enumeration of any object, purpose, power, manner, method or thing shall not be deemed to exclude like or similar objects, purposes, powers, manners, methods or things.

Section 29. The provisions of this Act are severable, and if any clause, section or provision of this Act shall be held to be in violation of the Constitution of Louisiana and/or the United States, this shall not have the effect of invalidating any part that is constitutional, and the part or parts not affected by such ruling shall continue in full force and effect.

Section 30. All laws or parts of laws in conflict herewith be and the same are hereby repealed.

EDUCATION

School Closing—Louisiana

Act No. 256 (House Bill No. 942) of the 1958 regular session of the Louisiana Legislature, approved July 2, 1958, grants the governor authority to close "any racially mixed public school or schools under court order to racially mix its student body."

AN ACT to amend Title 17 of the Louisiana Revised Statutes of 1950 by adding thereto a new section to be designated as 81.2, relative to the authority of the Governor, as the chief magistrate of the state, to secure justice to all, preserve the peace, and promote the interest, safety, and happiness of all the people by closing any racially mixed public school or school under court order to racially mix its student body: by providing protection for the rights of personnel and property of such closed schools; by providing for the reopening of such schools; and by providing for the alienation of school properties to private persons; and to repeal all laws in conflict herewith.

Be it enacted by the Legislature of Louisiana:

Section 1. The Governor of the State of Louisiana, as the Chief Magistrate, in order to secure justice to all, preserve the peace, and promote the interest, safety, and happiness of all the people, is authorized and empowered to close any racially mixed public school or any public school which is subject to a court order requiring it to admit students of both the negro and white races by a date certain, and fix the effective date of such closing. The Governor is further authorized and empowered to close any other school or schools in any parish or city school system where a school has been closed under the provision of this section if in his opinion the operation of such school or schools might cause friction or disorder among the school children or citizens of said system or result in a breach of the peace, civil disorder, or strife.

Section 2. The Governor shall take necessary action to protect all public school property of any school or schools ordered closed in compliance with Section 1 hereof.

Section 3. The Governor shall, whenever in his judgment he determines that peace and good order can be maintained and the school operated as a racially separate institution, order the reopening of any school closed as above provided and the legal authorities of such closed school shall resume their duties and functions as public school employees.

Section 4. Any school which cannot be reopened by order of the Governor, within a reasonable time, or at the conclusion of the school term during which such order closing the school was issued, shall be deemed indefinitely closed as a public school.

Section 5. The Governor shall direct the parish and city School Boards to protect the rights and privileges of sick leave, sabbatical leave, all other types of leave, tenure, retirement, and any other rights and privileges of teachers, bus drivers, and all other school employees whose employment shall be affected by the closing of such schools; and provided further that the Governor shall direct the parish and city School Boards to continue salary payments and other benefits of such personnel for the remainder of the school year, except where they have been assigned duties in another public school, have entered a business or accepted other full time private employment. In the event any such employee shall enter a business or accept full time private employment and his annual wages,

salary or income therefrom is less than that which he would have earned as a public school employee, the parish or city School Board for which he was working at the time of severance, shall pay to him the difference between his actual income and that which he would have earned as a public school employee during the school year in which the school was closed. In any such cases the parish or city School Board may at any time require reasonable proof of any former employee's status with respect to employment and or income and withhold any payment herein provided until such proof has been furnished.

Section 6. The Governor shall direct the parish and city School Boards and the State Board of Education to recognize all children in schools temporarily closed because of a mixing of the races as being in actual attendance during this interval. The parish or city School Board shall have authority to promote any or all such students in accordance with rules and regulations adopted by the State Board of Education.

Section 7. Any parish and city School Board may sell, lease, or otherwise dispose of, at public or private sale, for cash or on terms of credit, any real or personal property used in connection with the operation of any school or schools within its jurisdiction which has been indefinitely closed by order of the Governor as provided herein, to any private agency, group of persons, corporations, or cooperative bona fide engaged in the operation of a private non-sectarian school, whom in the opinion of such Board the best interest of the schools system would be served by such action. In any such sale, lease, of disposal the consideration provided, whether represented by cash or credit, shall be equal to the reasonable value of the property, which, in case of a sale, shall be not less than the replacement costs of the property sold.

Section 8. If any Section or part of any Section of this Act is declared to be unconstitutional or invalid, the remainder of this Act shall not thereby be invalidated.

Section 9. All laws or parts of laws in conflict herewith be and the same are hereby repealed.

EDUCATION
School Officials' Salary—Louisiana

Act No. 187, (House Bill No. 941) of the 1958 regular session of the Louisiana Legislature, approved June 30, 1958, preserves the salary of any school official who is called away from his normal duties as a consequence of federal action relating to integration.

AN ACT to preserve, protect, and/or maintain any per diem, salary, and/or other emoluments due or which may become due to any state or local school official or employee during time necessarily spent by such person away from his normal duties as a consequence of federal action relating to integration or mixing of the races in the public schools of Louisiana and to repeal all laws or parts of laws in conflict herewith.

Be it enacted by the Legislature of Louisiana:

Section 1. Any per diem, salary and/or other emoluments due or which may become due to any State or local school official or employee shall be continued, preserved, protected and/or maintained during time necessarily spent by such person away from his normal duties as a consequence of Federal action relating to integration of the races in the public schools of Louisiana. During any such time, the said State or local school official or employee shall be considered as being engaged in the actual performance of the duties of his office or employment, regardless of whether he is merely engaged in a proceeding before a Federal Court, board, commission or officer, or is imprisoned or confined pursuant to an order or judgment of a Federal court.

Section 2. Nothing contained herein shall be

deemed to grant or authorize an extra compensation, fee, or allowance to any official or employee as prohibited by Section 3 of Article IV of the Constitution of 1921.

Section 3. All laws or parts of laws in conflict herewith be and the same are hereby repealed.

EDUCATION

Tuition Grants—Louisiana

House Bill No. 948 of the 1958 regular session of the Louisiana Legislature, approved July 24, 1958, proposes an amendment to the Louisiana Constitution to allow the legislature to make tuition grants to students attending private, nonsectarian schools.

A JOINT RESOLUTION

Proposing an Amendment to Section 1 of Article XII of the Constitution of Louisiana relative to the education of the school children of the state, the public education system, financial assistance to students attending private nonsectarian elementary and/or secondary schools and the use of public funds therefor.

Be it resolved by the Legislature of Louisiana, two-thirds of the members elected to each house concurring:

Section 1. That there shall be submitted to the electors of the State of Louisiana, for their approval or rejection, a proposition to amend Section 1 of Article XII of the Constitution of Louisiana, so that it shall read as follows:

Section 1. The Legislature shall have full authority to make provisions for the education of the school children of this State and/or for an educational system which shall include all public schools and all institutions of learning operated by State agencies. In this connection, the Legislature may authorize and/or provide financial assistance to students attending private non-sectarian elementary and/or secondary schools in this State, out of any monies or funds presently or hereafter dedicated or devoted to public schools or public education whether by this Constitution or by statute, anything in this Constitution to the contrary notwithstanding. A non-sectarian school, as used herein, shall mean a school whose operation is not controlled directly or indirectly by any church or sectarian body or by any individual or individuals acting on behalf of a church or sectarian body. Children attaining the age of six within four months after the beginning of any public school term or session may enter public schools at the beginning of the school term or session, and kindergartens may be authorized for children between the ages of four and six years, provided that in any parish or municipality the School Board may establish the policy that only children attaining the age of five on or before December 31 may enter kindergarten at the beginning of the term or session and only those attaining the age of six on or before December 31 may enter regular public school at the beginning of the term or session.

Section 2. That said proposed amendment be submitted to said electors at the next general election to be held in the State of Louisiana on the first Tuesday next following the first Monday in November, 1958.

Section 3. That on the official ballot to be used at said election, there shall be printed:

FOR amending Section 1, Article XII, Constitution, relative to the education of the school children of the state, the public educational system, and financial assistance to children attending private schools, and also:

AGAINST amending Section 1, Article XII, Constitution, relative to the education of the school children of the state, the public educational system, and financial assistance to children attending private schools.

Each elector voting on said propositions for so amending said Constitution shall indicate his vote relative thereto in the manner provided by the General Election Laws of the State of Louisiana.

Sixty-six members of the Louisiana State University faculty signed a petition sponsored by the Louisiana Civil Liberties Union, petitioning the Special Joint Committee of the Louisiana Legislature to defeat proposals for the closing of the public schools if integrated. A committee of the legislature then submitted a questionnaire to sixty-three of the signers, including these questions: (1) Did the individual listed sign the petition? (2) Did he understand what he was signing? (3) Did he know that the Louisiana Civil Liberties Union was the originator of the petition? (4) Is he a member of: a) the Louisiana Civil Liberties Union? b) The American Civil Liberties Union? c) The NAACP? d) The Communist Party? e) The Southern Regional Council? f) The Southern Conference Education Fund? (5) Does he teach or advocate integration of the races in classes? (6) Does he believe in integration? (7) Does he publicly advocate integration? Following is a tabulation in the exact form prepared by the committee, Sen. W. M. Rainach, chairman:

		Petition									Membership						Integration								
		Signed			Understands			Knows ACLU As Originator			LCLU	ACLU	NAACP	CP	SRC	SCEF	Teaches			Believes In			Advocate		
	Total	Yes	No	Qual.	Yes	No	Qual.	Yes	No	Qual.							Yes	No	Qual.	Yes	No	Qual.	Yes	No	Qual.
Agriculture																									
Poultry	1	1			1					1							1					1		1	
Arts and Sciences																									
Botany, etc.	1	1			1					1							1				1				1
English	22	22			19		3	2	18	2	2	2					20	2		10	3	9	3	15	4
Foreign Lang.	2	2			2				2								2			2			1	1	
Geology	1	1			1			1									1					1		1	
Government	5	5			5			1	3	1	2	2					3	2		4		1		4	1
History	5	5			3	1	1	1	3	1	1	1					5			3	1	1		5	
Mathematics	5	5			5				4	1							5			4		1		5	
Psychology	4	4			4				4								4			2		2	1	2	1
	45	45			40	1	4	5	34	6	5	5					41	4		25	4	16	5	33	7
Commerce																									
Economics	3	3			3				3								3			1	1	1		3	
Finance	1	1			1			1									1					1		1	
Management, Marketing	1	1			1				1								1			1				1	
	5	5			5			1	4								5			2	1	2		5	
Law	3	3			3			1	1	1							2	1		1		2		2	1
Libraries	8	8			6	1	1		6	2							7	1		2	2	4		7	1
University Press	1	1			1			1										1		1					1
	63	63			56	2	5	8	45	10	5	5					56	7		31	7	25	5	48	10

VOTING

Registrars' Salaries—Louisiana

Act No. 483 (House Bill No. 952) of the 1958 regular session of the Louisiana Legislature, approved July 9, 1958, provides for the continuation of the salary of any registrar or deputy registrar while away from normal duties because of federal legal action related to voting.

AN ACT to preserve, protect and/or maintain any salary and/or other emoluments due or which may become due to any registrar or deputy registrar of voters during time necessarily spent by such persons away from his normal duties as a consequence of federal action relating to a charged violation of federal laws affecting voting rights or privileges, and to repeal all laws or parts of laws herewith.

Be it enacted by the Legislature of Louisiana:

Section 1. Any salary and/or other emoluments due or which may become due to any Registrar of Voters or any Deputy Registrar of Voters of any parish in the State shall be continued, preserved, protected and/or maintained during time necessarily spent by such person away from his normal duties as a consequence of federal action relating to the right and/or privilege of voting of any citizen or citizens of the parish served by said official or officials. During any such time, the said Registrar and/or Deputy Registrar shall be considered as being engaged in the actual performance of the duties of his office of employment, regardless of whether he is merely engaged in a proceeding before a Federal Court, Board, Commission or official, or is imprisoned or confined pursuant to an order or judgment by a Federal Court.

Section 2. Nothing contained herein shall be deemed to grant or authorize any extra compensation, fee, or allowance to any official or employee as prohibited by Section 3, Article 4, Constitution of 1921.

Section 3. All laws or parts of law in conflict herewith are hereby repealed.

EMPLOYMENT

Fair Employment Laws—California

The Board of Supervisors of the City and County of San Francisco, California, on July 10, 1957, enacted Ordinance No. 10478 which prohibits discrimination in employment in the city on the basis of race, color, religion, ancestry or national origin. The ordinance established a Commission on Equal Employment Opportunity and provides for investigatory and enforcement powers for the Commission. 2 Race Rel. L. Rep. 846. The ordinance was amended on July 2, 1958, to further define the status and powers of the members of the Commission and to re-name the chief staff officer "Executive Director."

FILE NO. 15143-3 ORDINANCE NO. 379-58

Amending Ordinance No. 10478 (Series of 1939) by adding Section 5.1 to provide for creation of a commission on equal employment opportunity, defining the status of members as officers, and declaring powers of the commission; and by substituting the word "Director" for the word "Secretary" in Paragraph (b) of Section 6.

Be it ordained by the people of the City and County of San Francisco:

Section 1. Ordinance No. 10478 (Series of

1939) is hereby amended by adding thereto Section 5.1 to read as follows:

Section 5.1 CREATION OF GOVERNING COMMISSION.

There is hereby created a Commission on Equal Employment Opportunity for the City and County of San Francisco, the members of which are designated and declared to be officers of the City and County. Said commission shall have and possess, in addition to the powers hereinafter set forth, all of the rights, powers and privileges provided by the Charter of the City and County to be exercised by the several boards and commissions of the City and County.

Section 2. Section 6 of Ordinance No. 10478 (Series of 1939) is hereby amended to read as follows:

Section 6. COMMISSION ON EQUAL EMPLOYMENT OPPORTUNITY.

(a) The City and County of San Francisco Commission on Equal Employment Opportunity shall consist of seven (7) members to be appointed by the Mayor with the approval of the Board of Supervisors. Two (2) of the members who are first appointed shall be designated to serve for terms of one (1) year, two (2) for two (2) years, two (2) for three (3) years and one (1) for four (4) years from the date of their appointments. Thereafter, members shall be appointed as aforesaid for a term of office of four (4) years, except that all of the vacancies occurring during a term shall be filled for the unexpired term. A member shall hold office until his successor has been appointed and has qualified. The Mayor shall designate which of the members of the agency appointed shall be the first chairman, but when the office of the chairman of the Commission becomes vacant thereafter the Commission shall elect a chairman from among its members. The term of office as chairman of the Commission shall be for the calendar year or for that portion thereof remaining after each such chairman is designated or elected. Any member of the Commission may be removed by the Mayor upon notice and hearing for neglect of duty or for malfeasance in office but for no other cause.

It shall constitute malfeasance in office for any Commissioner to divulge or reveal to any person, except the parties to the proceedings, members of the Commission and its staff, any evidence or information obtained in any proceedings pursuant to Section 8(b) hereof.

It shall constitute malfeasance in office for any Commissioner to divulge or reveal to any person, except to the parties to the proceedings, members of the Commission and its staff or the City Attorney under and pursuant to Section 9 hereof, any evidence or information obtained in any proceedings pursuant to Section 8(c) hereof.

(b) The Board of Supervisors shall provide funds to compensate the Commissioners and to pay for an Executive Director and such other staff services and facilities as may be required by the Commission.

The Commission shall have the power to appoint an Executive Director who shall be the executive head of its affairs.

Any employee of the Commission who shall divulge or reveal to any person other than parties to the proceedings, members of the Commission and its staff any evidence or information obtained under or pursuant to Section 8(b) hereof, shall upon being found guilty by the Commission be subject to dismissal.

Any employee of the Commission who shall divulge or reveal any evidence or information obtained under Section 8(c) hereof to any person, except to parties to the proceedings, members of the Commission and its staff and the City Attorney, under and pursuant to Section 9 hereof, shall upon being found guilty by the Commission be subject to dismissal.

I hereby certify that the foregoing ordinance was passed for second reading by the Board of Supervisors of the City and County of San Francisco at its meeting of June 23, 1958.

ROBERT J. DOLAN,
Clerk.

* * *

NOTICE OF FINAL PASSAGE

Amending Ordinance No. 10478 (Series of 1939) by adding Section 5.1 to provide for creation of a Commission on Equal Employment Opportunity, defining the status of members as

officers, and declaring powers of the Commission; and by substituting the word "Director" for the word "Secretary" in Paragraph (b) of Section 6.

I hereby certify that the foregoing ordinance was read for the second time and finally passed by the Board of Supervisors of the City and County of San Francisco at its meeting of June 30, 1958.

ROBERT J. DOLAN,
Clerk.

Approved July 2, 1958.

HENRY R. ROLPH,
Acting Mayor.

ORGANIZATIONS

Legislative Investigation—Florida

Chapter 57-125 (Senate Bill No. 347) of the Session Laws of Florida, enacted by the 1957 Regular Session of the Florida Legislature, provides for the appointment of a joint legislative committee to investigate the activities of organizations that advocate violence. (See 3 Race Rel. L. Rep. 724). That act follows:

An Act to provide for the creation and appointment of a committee of the legislature to make investigations of the activities in this state of organizations advocating violence or a course of conduct which would constitute a violation of the laws of Florida; for the conduct of hearings and the subpoenaeing of witnesses; providing for circuit courts to enforce committee's processes; for a report of such committee to the 1959 legislature; authorizing the employment of specialized assistance by the committee; making an appropriation for the expenses of the committee; and providing an effective date.

WHEREAS, the joint committee set up by chapter 31498, laws of the extraordinary session, 1956, has expired with the filing of its report to the legislature as provided by said act; and

WHEREAS, said committee's records and report disclose a great abuse of the judicial processes of the courts in Florida, as well as certain activities on the part of various organizations and individuals which constitute violence or the threat thereof, or violations of the laws of this state and which activities are inimical to the well-being of the majority of the citizens of this state; and

WHEREAS, said committee worked under extreme pressure of time and with but limited personnel and therefore could not complete the full and thorough investigation which should be conducted into the organizations and individuals who come within the purview of said committee; and

WHEREAS, there is now available to said committee evidence and sources of evidence disclosing that the Communist party and other subversive organizations are seeking to agitate and engender ill-will between the races of this and other states; and

WHEREAS, there exists a grave and pressing need for such a committee to exist in the interim between the 1957 and the 1959 sessions of the legislature of Florida to continue and complete the work of the committee created by chapter 31498, supra, and to be ever ready to investigate any agitator who may appear in Florida in the interim,

Now, THEREFORE, the following bill is proposed to be enacted by the legislature because of all the foregoing:

Be it enacted by the Legislature of the State of Florida:

Section 1. There is hereby created a special committee of the legislature to be composed of seven (7) members, three (3) of whom shall be appointed from the membership of the state senate by the president, and four (4) of whom shall be appointed from the membership of the state house of representatives by the speaker. The members of said committee shall serve as such until discharged by the president of the senate and the speaker of the house of represen-

tatives upon receipt of their report at the regular 1959 session of the legislature.

Section 2. It shall be the duty of the committee to make as complete an investigation as time permits of all organizations whose principles or activities include a course of conduct on the part of any person or group which would constitute violence, or a violation of the laws of the state, or would be inimical to the well-being and orderly pursuit of their personal and business activities by the majority of the citizens of this state. Such investigations shall be conducted with the purpose of reporting to this legislature of the activities of such organizations to the end that corrective legislation may be adopted if found necessary to correct any abuses against the peace and dignity of the state.

Section 3.

(1) The committee is authorized to employ such experts, clerical and other assistance as may be required; to require by subpoena or otherwise the attendance of such witnesses and the production of such papers, bonds and documents, and to administer such oaths and to take such testimony and to make such expenditures within the limitation herein authorized as it may deem necessary in the performance of its duties.

(2) Should any witness fail to respond to the lawful subpoena of the committee, or having responded fails to answer all lawful inquiries or turn over evidence to this committee, the committee may file a petition before any circuit court in Florida setting up such failure on the part of said witness. On the filing of such petition the court shall take jurisdiction of the witness and the subject matter of said petition and shall direct the witness to respond to all lawful questions and to produce all documentary evidence in its possession which is lawfully demanded. The failure of any witness to respond pursuant to the order of the court shall constitute a direct and criminal contempt of court and the court shall punish said witness accordingly.

Section 4. The committee shall report to the 1959 regular session of the legislature the results of its investigations, together with its recommendations, if any, for necessary legislation. There is hereby appropriated from the general revenue fund for expenses of the committee in conducting its investigation the sum of seventy-five thousand dollars ($75,000.00) which shall be expended under the direction of the committee.

Section 5. This act shall take effect immediately upon becoming a law.

Became a law without the Governor's approval.

Filed in Office of Secretary of State May 16, 1957.

ADMINISTRATIVE AGENCIES

EDUCATION

Public Schools—Arkansas

The Pine Bluff, Arkansas School Board adopted in September 1956 a plan providing for integration at the first grade level in the fall of 1958 to begin upon the completion of certain new physical facilities. On March 20, 1958, following desegregation-connected violence elsewhere in the state, the board adopted a resolution postponing the starting date for the plan. A statement of the plan adopted and of the suspension of the plan follow:

STATEMENT OF THE
PINE BLUFF SCHOOL BOARD

Nearly four years ago, the United States Supreme Court handed down a decision which in effect, held that compulsory segregation of races in school districts must be discontinued. On May 25, 1954, the Pine Bluff School District recognized the necessity of complying with the decision of the Supreme Court, after further directions by the Court were announced.

In order to prepare a feasible plan for orderly compliance with the principle of the court's decision, a Citizens' Committee, composed of both white and negro citizens, was selected to advise the Board. After much thought and discussion had been given to the problem, a detailed plan was formulated by the committee and the Pine Bluff School Board.

The plan recognized that the increased enrollment in the Pine Bluff School System made it necessary to construct additional school facilities. New schools are now being built at East 20th Avenue and Ohio, East 34th Avenue and Missouri Street and West 40th and Mulberry Street.

It was anticipated under the plan that upon completion of the additional facilities, compulsory segregation would be discontinued at the first grade level in the fall term of 1958, and in the higher grades as fast as conditions in the community would permit.

The Pine Bluff School Board accepted this plan in September, 1956, as reported in the local press.

The Board adopted this plan in good faith with the full and complete expectation of carrying out its provisions. However, since the plan was adopted, events have occurred within our state which have compelled the Board to re-examine the suggested timing for the beginning of the plan. Additional meetings have been held with the Citizens' Committee to seek a cross-section of opinion and the benefit of their counsel.

In view of all that has transpired within our state and in our neighboring city, and in the interest of the public good and the peace, harmony and tranquility that have always existed between the races in Pine Bluff, the Board feels that it will not be for the best interest of our community or for the people of any race within our community for the plan to be implemented in September, 1958, as originally proposed. Therefore, the Pine Bluff School Board has decided to defer temporarily the starting date for the plan.

In postponing the starting date for the plan, the Pine Bluff School Board wishes to re-affirm its position with reference to compliance with the principle set forth in the United States Supereme Court's decision. It re-emphasizes its approval of the plan as promulgated and expects to put the plan into effect at the earliest practical time. It is the intention of the Board to re-examine the subject not later than April 1, 1959, in order to determine the practicability of setting a new starting date.

EDUCATION

Public Schools—Texas

The Dallas Independent School District Board of Education has issued a "Statement on Desegregation" declaring its intention to maintain segregation in its public schools pending interpretation by state courts of legislation (2 Race Rel. L. Rep. 695) requiring a local option election before desegregation, and providing for the withdrawal of state funds if such an election is not held. See *Rippy v. Borders*, 3 Race Rel. L. Rep. 17 (5th Cir. 1957), and *Dallas Independent School District v. Edgar*, 3 Race Rel. L. Rep. 656 (5th Cir. 1958).

STATEMENT

It was on July 13, 1955, that this Board of Education made its first official Statement on Desegregation as a result of the decree of the Supreme Court of the United States that discrimination because of race within the public schools was no longer constitutional.

At that time the Board instituted an immediate start towards implementation of this decision by the sound and reasonable method of instructing the Superintendent of Schools to study anticipated problems inherent to the alteration of a hundred-year-status school system in twelve applicable areas. These studies were given high priority; they were conducted to the satisfaction of the Board; and the results now are a matter of public record. The wisdom of this approach has been amply justified by subsequent events in other communities, by facts developed, and by conclusions drawn. The formal study of the problems of integration by the Board and the Administrative Staff has been continuous and will be pursued without cessation. Furthermore, invaluable observations and object lessons have been derived from the analyses of other school districts which have proceeded with some form of integration with variable results.

It was also in July, 1955, that this Board, recognizing that it is not a law-making body but rather one that has the dual responsibilities of creating policies and implementing bonafide laws regarding education, stated that "it would do what it was told to do by the proper authorities," but "would be impatient with undue pressure designed to provoke a premature alteration of present policy."

However, in September, 1955, this School System as a consequence of the aforestated attitude became the defendant in district and appellate federal courts and has remained in that position to this date. The planned attitude and policy of the Board have received judicial analyses in the courts on several occasions, with the result that the United States Court of Appeals of the Fifth Circuit rendered the last applicable opinion on July 23, 1957, that ". . . appellees desegregate the schools under their jurisdiction . . . with all deliberate speed . . ." This opinion may be interpreted as a nominal approval by the federal courts of the Dallas policy and procedure. This opinion has not been appealed by the School District.

[*Further Dilemma*]

In the fall of 1956 a further dilemma was presented to the beleaguered school boards of Texas in the passage by the Legislature of House Bill 65, which in essence states that any school district that integrates without referendum shall be denied accreditation, shall lose Foundation State funds (approximately $1,500,000 in Dallas), and that the authorities shall be assessed substantial fines. The law further requires that such an election shall be ordered only if a petition bearing 20 per cent of the qualified voters of the school district shall petition the Board for such an election. No such petition has been filed with this Board, and, thus, the conflict between the federal courts' decrees and the state laws arises.

In this community approximately 32,000 petitioners would be required to request such an election, at a cost to the School District of approximately $12,000. The Board has no way of predicting the result of such a vote.

The Board decided to pursue what it considered to be the legal and logical method of resolving this conflict between federal and state governments, and on September 26, 1957, requested for itself and other communities of Texas clarification in the form of a declaratory judgment through the federal district court. The result of this effort was dismissal by the district

court in an opinion rendered by the Fifth Circuit Court on May 24, 1958, that "for want of federal jurisdiction" the matter could not be so resolved.

This Board has declared its intention to seek at the earliest applicable date the answer to this problem in the courts of Texas. In the meantime, the Board of Education continues to face its dilemma resulting from the conflict between federal and state laws in connection with this all important problem.

[*Await Unanimity*]

The Board is convinced that it would be poor service to Dallas and to the large area in the Southwest which may follow the Dallas lead to undertake the activation of the Supreme Court decree until federal and state courts reach some legally acceptable unanimity of opinion. As before stated, it is neither the School System nor the City of Dallas which is on trial, but rather the confused judiciary processes of this nation resulting from this and other conflicts in federal and state laws. It is our own studied opinion that a sound and trouble-free solution of integration cannot be found until these differences are resolved. This Board will continue to pursue objectively a course which will lead to such an answer.

This Board desires to be instrumental in resolving the integration problem in a manner better than has yet evolved, inasmuch as it recognizes that uncertainty creates tension and confusion both within the school system and within the community. During this period of stress the Board and the Administrative Staff will continue to make every conscientious effort to provide for all the children of Dallas the best educational program possible. We beg for the tolerance, patience, and understanding of all concerned.

Though the Board reserves the right to alter this directive if the situation changes or judgment directs, at this time for the foregoing reasons it instructs the Superintendent of Schools of the Dallas Independent School District that there shall be no alteration of the present status regarding segregation of the races within the schools of this District for the school year beginning September, 1958.

EDUCATION

Private Schools—Virginia

The State Corporation Commission of Virginia issued a certificate of incorporation on June 27, 1958, to the Tidewater Educational Foundation. The purpose of the foundation is described in the charter as being to provide educational opportunities in one or more private educational establishments in Norfolk, Virginia. Virginia has enacted statutory procedures for the support of students in private non-sectarian schools in the event of integration of public schools. 1 Race Rel. L. Rep. 1093, 1094, 1097, 1101. The articles and certificate of incorporation are reproduced below.

CERTIFICATE OF INCORPORATION
OF
TIDEWATER EDUCATIONAL FOUNDATION

This is to certify that we, the undersigned, do hereby associate ourselves to establish a corporation under and by virtue of Chapter or Title 13 (13.1-201, et seq.) of the Code of Virginia, 1950 (Michie) as amended, for the purposes and under the corporate name hereinafter mentioned and to that end we do, by this, our certificate, set forth as follows:

(a) The name of the corporation is to be Tidewater Educational Foundation, Incorporated.

(b) The purposes for which the corporation is organized are as follows:

To provide educational opportunities for students, to establish, own, lease, operate and

administer one or more private educational establishments in the City of Norfolk, Virginia and/or the adjacent cities and counties; to provide necessary teachers, administrative staff or staffs, facilities of every kind for education, including transportation, to do any and every act or acts, thing or things which a corporation of this character may do and generally to exercise the powers set forth in section 13.1-205 of the Code of Viriginia (1950).

(c) The corporation is to have members, without, however, the right to vote.

(d) The maximum number of directors who are to manage the affairs of the corporation shall be thirty (30) and vacancies in such numbers are to be filled by the remaining directors. The entire voting power shall be vested in the directors who may take any lawful action by or on behalf of the corporation which might be taken by members having such voting power or by stockholders and directors under any provision of the law of Virginia. The Board of Directors may, by resolution passed by a majority of the whole board, in their discretion, designate not less than three (3) nor more than seven (7) of their number to constitute an Executive Committee who shall have and exercise the power of the Board of Directors in the management of the business and affairs of the corporation during the interval between Board meetings to the extent permitted by law. Directors shall be elected by the Board of Directors for a term of three years. Prior to the expiration of the first year, the President and Secretary shall draw lots to divide the terms of the said directors into periods of one, two and three years, respectively, and said officers shall report such division to said directors and to the full Board; thereafter this same proportion among the directors shall be maintained, so that the terms of office of one-third of the directors shall expire annually.

(e) The address of corporation's initial registered office shall be Room 420 Citizens National Bank Building, 109 Main Street, Norfolk, Virginia, and the name of its initial registered agent at such address is Harvey E. White, Jr., Attorney at Law, a resident of the City of Norfolk, Virginia.

(f) The number of Directors, constituting the initial Board of Directors is five (5) and their names and residences are as follows:

Kathleen S. Griffin, 1602 DeBree Ave., Norfolk, Va.
James G. Martin, IV, 1019 Graydon Avenue, Norfolk, Va.
W. I. McKendree, 9443 Willowwood Terrace, Norfolk, Virginia
Wm. Moultrue Guerry, 2111 Claremount Avenue, Norfolk, Va.
Hal J. Bonney, Jr., 322 W. Bute Street, Norfolk, Virginia

(g) The period for the duration of the corporation is unlimited.

(h) The amount of real estate to which its holdings at any time are to be limited is 4,000 acres.

GIVEN under our hand this 19th day of June, 1958.

Kathleen S. Griffin
James G. Martin, IV
W. I. McKendree
Wm. Moultrue Guerry
Hal J. Bonney, Jr.

STATE OF VIRGINIA,
City of Norfolk, to-wit

I, Harvey E. White, Jr., a Notary Public in and for the City of Norfolk, State of Virginia, do certify that Kathleen S. Griffin, James G. Martin, IV, W. I. McKendree, Wm. Moultrue Guerry and Hal J. Bonney, Jr., whose names are signed to the foregoing writing bearing date of June 19, 1958, have acknowledged the same before me in my city and state aforesaid.

GIVEN under my hand this 19th day of June, 1958.

My commission expires: 9-19-59.

Harvey E. White Jr.
Notary Public

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
At Richmond, June 27, 1958

The accompanying articles having been delivered to the State Corporation Commission on behalf of Tidewater Educational Foundation, Incorporated, and the Commission having found that the articles comply with the requirements of law and that all required fees have been paid, it is

ORDERED that this CERTIFICATE OF INCORPORATION be issued, and that this order, together with the articles, be admitted to record in this office of the Commission; and that the

corporation have the authority conferred on it by law with the articles, subject to the conditions and restrictions imposed by law.

Upon the completion of such recordation, this order and the articles shall be forwarded for recordation in the office of the clerk of the Corporation Court of the city of Norfolk.

State Corporation Commission
By H. Lester Hooker
Chairman

EMPLOYMENT
Fair Employment Laws—Ohio

Mary Ann SIMMONS v. GRACE E. SMITH COMPANY
Eddie Louise PARRIS v. GRACE E. SMITH COMPANY

Board of Community Relations, Toledo, Ohio, June 26, 1958, Complaint Nos. 15, 21.

SUMMARY: Two Negro women filed complaints against an employer alleging discriminatory hiring practices under the Toledo city Fair Employment Practices Commission ordinance. The first complainant charged that the employer's personnel manager told her that it had been his practice to employ only white women for the job in question. The second complainant alleged that she applied in response to an advertisement, that she was not given employment and that the letter "C" (for "colored") was placed on her application. A panel of the Board of Community Relations was convened to hear the complaints and ruled that the ordinance was violated as to the first complainant but that the employer's defense of unsatisfactory references as to the second complainant was justified.

PREAMBLE: Upon receipt of the above noted complaints, the Chairman of the Board of Community Relations, Mr. C. Arthur Collin, appointed the following panel in accordance with the F.E.P. Ordinance, to consider those complaints: Mr. Marcus L. Friedman, Miss Lois Harbage, Mr. William Spranger, Mr. Howard Rediger and Reverend G. J. Johnson. The panel caused an investigation of the complaints to be made and attempted to bring about a satisfactory adjustment of the complaints through conciliation. Failing in this, it referred the complaints to the Mayor for additional conciliation. The Mayor informed the panel that he was unable to satisfactorily adjust the complaints. Therefore, the panel set the above-mentioned cases for hearing on the 26th day of June, 1958, in the City Council Chambers.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Upon the pleadings, the evidence and the exhibits introduced, in the public hearing of the above causes, before a duly appointed panel of the Board of Community Relations of the City of Toledo, the Board finds the following conclusions of facts:

1) That the Respondent, Grace E. Smith Company, advertised on March 6, 1957, for a cleaning woman, said ad appearing in a Toledo newspaper.

2) That Mary Ann Simmons, the Complainant, applied for the above-mentioned job on March 7, 1957, at the offices of the Grace E. Smith Company in the Bell Building, in the City of Toledo, Ohio.

3) That the Personnel Manager of the Respondent informed this Complainant that the job was open only to white women.

4) That on April 11, 1957, the Personnel Manager set forth a statement, which is Complainant's Exhibit No. 1, that it has been the practice of the Respondent to employ only white women for night cleaning work and only Negro boys for bus-boy operations.

5) That the Respondent did not take an application from this Complainant on March

7, 1957, for the job as advertised.

6) That the Respondent, through its President, submitted a letter to the Personnel Manager as set forth in Respondent's Exhibit No. 1, stating a change of employment policy.

7) That the Respondent put in evidence its Exhibit No. 3, which is the employment application of the Complainant as taken after a conference with Mr. Frank Fager, Executive Secretary of the Board of Community Relations. That said application had designated "C" on said application and that the said "C" designated "colored".

8) That the Executive Secretary discussed the company's employment practices with Mr. Ralph Smith, President of Respondent and he maintained intent to continue employment of races by category.

9) That in the matter of the Complainant, Eddie Louise Parris, it is found that Complainant filed her application with the Grace E. Smith Company, Respondent, for a position of counter girl or pantry girl, as designated in Respondent's Exhibit No. 2, and said application was made on August 14, 1957, and followed up by Complainant based on an advertisement on August 22, 1957, for counter girl in a Toledo newspaper.

10) That said Complainant gave certain poor references and that said references did not check out as to indicate the Complainant would be a good risk for employment.

11) That the application of Eddie Louise Parris had a "C" on the top, Respondent's Exhibit No. 2, which, in accordance to the evidence, represented "colored".

12) The evidence further discloses that the Respondent has been hiring, over a period of years, at least twenty-five (25%) per cent of its working force from the Negro race. The panel noted the Respondent's consideration and feels that it should be commended for its practice of furnishing employment to members of the Negro race.

And as conclusions of law in these cases and based on the foregoing conclusions of fact, the duly appointed panel of the Board of Community Relations finds:

(A) That as refers to the Complainant, Eddie Louise Parris, that she did not meet the qualifications for the job because of poor references, and the Respondent was not guilty of discrimination.

(B) That in the matter of Mary Ann Simmons, Complaint No. 15, there was a direct violation of the F.E.P. Ordinance.

(C) That the actions of the Respondent were not in accord with the Fair Employment Practice Ordinance of the City of Toledo in that the Respondent followed the practice of hiring only Negroes for certain job categories and only Whites for certain other job categories, thus segregating employees by race and making impossible hiring solely on the basis of merit.

(D) That in both cases the designation of "C" on the application forms designating "colored", together with filing of such forms in a separate category, was a violation of the F.E.P. Ordinance.

Therefore, in conformity with the City Ordinance of the City of Toledo, Ohio, and upon all the evidence taken in the complaints in the above causes, the Board of Community Relations, through its duly appointed panel, by unanimous vote, finds the Respondent not guilty as relates to Complaint #21, Eddie Louise Parris; it further finds the Respondent guilty of committing the discriminatory practices alleged in Complaint #15, Mary Ann Simmons, and herewith issues the following order to the Respondent:

That it hereby cease and desist from discriminating against Mary Ann Simmons because of her race; that it cease and desist from excluding applicants from any job category because of their race; that it cease and desist from segregating applications for employment on the basis of race; that it furnish proof of compliance with this order to the Executive Secretary of the Board of Community Relations within sixty (60) days hereof.

Respectfully submitted,
Marcus L. Friedman
Lois Harbage
William F. Spranger
Howard H. Rediger
Rev. G. J. Johnson

July 21, 1958

EMPLOYMENT

Labor Relations—Federal Statutes

CHOCK FULL O' NUTS and UNITED BAKERY, CONFECTIONERY, CANNERY, PACKING AND FOOD SERVICE WORKERS UNION OF NEW JERSEY, LOCAL 262, RWDSU, AFL-CIO.

National Labor Relations Board, June 4, 1958, Case No. 2-RC-8684, 120 NLRB No. 172.

SUMMARY: A local labor union objected to conduct affecting the results of a certification election at a Chock Full o' Nuts food processing factory in New Jersey. The union maintained, among other contentions, that two vice-presidents of the employer and the plant manager urged employees to vote against the union with appeals to racial prejudice. One of the vice presidents, Jackie Robinson, a Negro, is alleged to have told employees that white employees were jealous of his position and that, should the union be successful, all Negroes would be fired. The National Labor Relations Board regional director recommended that the union's objections be overruled. Citing the reasons set forth in *Sharnay Hosiery Mills, Inc.*, 120 NLRB 102, Case No. 11-RC-1000 (3 Race Rel. L. Rep. 564), the board found the union's objections without merit and upheld the election. The board said that "while we do not condone appeals to racial prejudice . . . we do not find that the injection of the issue, or the context in which it was discussed therein, sufficient grounds for invalidation of the results."

SUPPLEMENTAL DECISION AND CERTIFICATION

Pursuant to a Decision and Direction of Election,[1] issued on June 13, 1957, the Regional Director for the Second Region on July 9, 1957, conducted an election by secret ballot among the employees in the unit, which was found appropriate by the Board. The results of the election, as set forth in a Tally of Ballots furnished the parties, showed that all of the approximately 67 eligible voters had participated in the election. Of the 67 ballots cast, 22 were for and 42 were against the Petitioner, 2 ballots were challenged, and 1 was void. The challenged ballots were insufficient in number to affect the results of the election.

Thereafter, the Petitioner filed timely objections. The Regional Director investigated them and, on March 11, 1958, issued and duly served upon the parties a Report on Objections in which he recommended that one of the objections be sustained and that the remainder be overruled. The Employer and Petitioner filed timely exceptions to the Report.

The objections allege, in summary, that: (1) the election notices were posted less than 48 hours before the election; (2) various officers of the Employer threatened employees with reprisals and loss of wages and other benefits; (3) members of management promised benefits to certain employees if they would vote against the Petitioner and threatened them with loss of jobs if the Petitioner won the election; (4) employees were transferred to the plant here involved for the specific purpose of voting against the Petitioner; (5) Symanski, an election observer selected by the Employer, was a supervisor; (6) the Employer sent out a letter which contained false and misleading statements; and (7) the ballot form annexed to the election notice was defaced by an "X" in the "Vote No" column.

[*Director's Findings*]

The Regional Director found that: (1) no employee was disenfranchised as a result of the shortened posting period; (2) there was evidence to sustain certain aspects of this objection, which matters will be discussed *infra*; (3) there was no evidence that employees were promised raises if they voted against the Petitioner and the alleged threat of loss of jobs was made prior to the issuance of the Board's Decision and Direction of Election and, hence, was barred under the Woolworth[2] policy; (4) there was no evidence showing that employees were transferred so as to vote against the Petitioner; (5) the alleged supervisor at the elec-

1. 118 NLRB 156. 120 NLRB No. 172.

2. F. W. Woolworth Company, 109 NLRB 1446.

tion was, in fact, a roving inspector with no supervisory authority; (6) the statements in the letter were legitimate campaign propaganda which did not impair the employee's freedom of choice; and (7) there was no evidence that the sample ballot was defaced.

The Regional Director recommended overruling all the objections but the second. The Petitioner excepted to his recommendations apparently with regard to the third, fifth and sixth objections and to parts of the second. The Employer excepted to certain findings in connection with the second objection and to the recommendation to set aside the election.

Contrary to the Petitioner's contention, we find that the Employer's letter of July 5, relied upon by the Petitioner, does not contain a promise to employees to continue the Christmas bonus if they voted against the Petitioner. Nor do we find such false and misleading information in the letter that it would affect the employees' ability to cast a free ballot. As for the alleged supervisory authority of Symanski, the Employer's observer, the Petitioner has adduced no evidence to support its position. Accordingly, we shall adopt the Regional Director's recommendations with respect to the third, fifth and sixth objections, as well as his recommendations with respect to the other objections to which no exceptions have been taken.

[*Robinson's Statements*]

With regard to the second objection, the Petitioner alleged, *inter alia*, that within 24 hours of the election, Jackie Robinson, a Vice President of the Employer, and William Berdick, another Vice President and the Plant Manager, urged employees to vote against the Petitioner employing appeals to racial prejudice. The objection alleges that Robinson went through the plant stating that the Petitioner had been brought in because the white employees were jealous of his position and that, should the Petitioner win the election, all negroes would be fired. Berdick, it is alleged, confronted the white employees with the threat that all of them would be fired if the Petitioner won and only negroes would be permitted to work.

The Regional Director found that the evidence did not support these specific allegations.[3] However, he did find that the evidence established that Robinson, from the early Spring of 1957 until within a few days of the election, frequently stated to negro employees that "he was the reason for the Union," that "some of the employees didn't want to be represented by me because of my race," and that the "white employees were jealous of my position with the Company."

The Regional Director further found that the Petitioner commented on certain aspects of the problems of racial discrimination and bias in an attempt to offset any persuasive appeal Robinson, as an officer of the Employer, might have. The Regional Director, nevertheless, recommended that this objection insofar as it related to the racial issue be overruled.

For the same reasons set forth in our opinion in *Sharnay Hosiery Mills, Inc.*,[4] the Regional Director's recommendation herein appears proper and we shall adopt it. While we do not condone appeals to racial prejudice, nor the conduct of the Company's Vice-Presidents in raising the issue, we do not find that the injection of the issue, or the context in which it was discussed herein, sufficient ground for invalidation of the results.

In the second objection, the Petitioner also alleged that some Employer representatives in supervisory positions threatened employees with reprisals and loss of wages and other benefits. The Regional Director found, and we agree, that most of the threats alleged in this objection were barred under the Woolworth policy. However, he did find that 2 conversations between Robinson and Stiles, an employee, occurred after the date of the issuance of the Decision and Direction of Election. He also found that they contained threatening implications of reprisals for employee activity protected by Section 7 of the Act. Therefore, he recommended that the election be set aside on this ground.

[*Free to Choose*]

The evidence indicated that Robinson told Stiles that he was free to choose whether or not

3. The Regional Director also found that, although Robinson and Berdick had talks with employees within 24 hours of the election, they were individual discussions at the employees' work stations and, thus, did not come within the proscription of the rule set forth in Peerless Plywood Company, 107 NLRB 427.

4. 120 NLRB No. 102, where Chairman Leedom and Member Bean joined in a concurring opinion.

he wanted to vote for the Petitioner, but, because of his 10 years seniority, he "shouldn't stick his neck out," should "be quiet" and that, if he was active, Robinson couldn't help him "in any way." In a second conversation, Robinson remarked that he had the final say on discharges and as long as Stiles "did his work he had no need for concern about his job." In connection with one of these conversations, Robinson also referred to another employee, Clarence Rice, stating that "Rice was on his own and that he wouldn't lift a finger to help him." Robinson apparently believed that Rice was writing unfair and abusive leaflets for the Petitioner. Robinson contends that he told Stiles that "Rice was on his own, and that he'd do nothing to help or hurt Rice."

We find nothing coercive in the second conversation with Stiles or in either version of the remarks concerning Rice which would warrant setting aside the election. The violation, if any, must be found in the warnings to Stiles not to "stick his neck out," and to "be quiet" and the statement that, if he was active, Robinson couldn't help him "in any way." We find, however, that such statements in a private conversation with 1 employee out of approximately 67 employees eligible to vote in the election are so isolated as to afford no sufficient grounds for setting aside the election.[5] Moreover, as indicated previously, Robinson later assured Stiles that, if he did his work he need have no concern over his job, thereby neutralizing, whatever coercive implications Robinson's earlier remarks had. We shall, therefore, overrule this objection.

Accordingly, we find that the Petitioner's objections do not raise substantial and material issues with respect to the conduct or results of the election and they are hereby overruled in their entirety. As the Petitioner had failed to secure a majority of the valid ballots cast, we shall certify the results of the election.

CERTIFICATION OF
RESULTS OF ELECTION

IT IS HEREBY CERTIFIED that a majority of the valid ballots has not been cast for United Bakery, Confectionery, Cannery, Packing and Food Service Workers Union of New Jersey, Local 262, RWDSU, AFL-CIO, and that said labor organization is not the exclusive bargaining representative of the employees of the Harrison, New Jersey, plant of Chock Full O' Nuts, in the unit heretofore found appropriate, within the meaning of Section 9(a) of the Act.

Dated, June 4, 1958, Washington, D. C.

Boyd Leedom, Chairman
Philip Ray Rodgers, Member
Stephen S. Bean, Member
Joseph Alton Jenkins, Member
John H. Fanning, Member

NATIONAL LABOR
RELATIONS BOARD

5. Lincoln Plastics Corporation, 112 NLRB 291, 292; Western Table Company, 110 NLRB 17, 18.

REAL PROPERTY
Restrictive Covenants—Florida

Lynn M. SHAW v. Duncan MACGREGOR

Florida Real Estate Commission, April 14, 1958, Progress Docket No. 809.

SUMMARY: The Florida Real Estate Commission charged Duncan MacGregor with misconduct in accepting a listing of property restricted for sale to Christians, and, in breach of faith to his principal, negotiating a sale of such property to a person of Jewish faith. Upon order of the commission denying the appellant's motion to quash the charge, an appeal was taken to the Florida Circuit Court which affirmed the commission's order. The Supreme Court of Florida also affrmed, declaring that the enforcement of an unconstitutional religious discrimination was not involved. Rather, the court viewed the action as a proceeding to punish the real estate broker for a breach of a statutory duty owing to his principal. 99 So.2d 709, 3

Race Rel. L. Rep. 314 (1958). On April 14, 1958, the Florida Real Estate Commission in its final order "found that the allegations of the Information are not proved by the evidence" and dismissed the proceeding. A copy of the final order follows:

FINAL ORDER

At a regular meeting of the Florida Real Estate Commission held at the Executive Offices at Orlando, Florida, on April 14, 1958,

Present: Walter S. Hardin, Chairman
Henry M. Jernigan
Robert T. Brinkley, Members.

Appearances: Edward L. Bridges, Attorney for Plaintiff.
B. F. Paty, Sr., Attorney for Defendant.

This proceeding came on for consideration of final order upon the examiner's report, the defendant's brief, and the oral argument of counsel for both parties, and, the Commission having considered same and being fully advised, it is found that the allegations of the Information are not proved by the evidence and that this proceeding should be dismissed.

It is, therefore, ORDERED that the above styled proceeding be, and the same is hereby dismissed.

DONE and ORDERED at Orlando, Florida, this 14th day of April, 1958.

Walter S. Hardin
Chairman
Henry M. Jernigan
Member
Robert T. Brinkley
Member

I certify that I served a copy of the foregoing order on the defendant's attorney, B. F. Paty, c/o Paty, Downey & Paty, 615 Harvey Building, West Palm Beach, Florida, by United States mail, on the 23rd day of April, 1958.

M. M. Smith, Jr.
Secretary

ATTORNEYS GENERAL

EDUCATION
School Admissions—Massachusetts

The chairman of the Massachusetts Commission Against Discrimination requested an opinion of the state attorney general regarding the request for a photograph of prospective students before they are accepted for admission to private schools. The attorney general, basing his reply on the Massachusetts Fair Education Practices Act, ruled that the requirement of a photograph before admittance of a student is unlawful.

December 20, 1957

Hon. Mildred H. Mahoney, Chairman
Commission Against Discrimination
41 Tremont Street
Boston, Massachusetts

Dear Mrs. Mahoney:

Your recent letter to the Attorney General requesting an opinion regarding the policy and interpretation of the Commission, that a request for a photograph by educational institutions, before the prospective student is accepted for admission, is an unfair educational practice under the "Fair Educational Practices Act", has been handed to me for attention. I do not think your request requires a formal opinion, but in order to assist you in the performance of your duties I shall advise you informally as follows:

St. 1949 c. 726 as amended by St. 1956 c. 334, G.L. (Ter.Ed.) c. 151C provides:

> **Section 1.** Declaration of Policy.—It is hereby declared to be the policy of the Commonwealth that the American ideal of equality of opportunity requires that students otherwise qualified, be admitted to educational institutions without regard to race, color, religion, creed or national origin, except that, with regard to religious or denominational educational institutions, students, otherwise qualified, shall have the equal opportunity to attend therein without discrimination because of race, color, or national origin . . . . .

Chapter 151C further provides:

> **Section 2.** It shall be an unfair educational practice for an educational institution:—
>
> (a) To exclude or limit or otherwise discriminate against any United States Citizen or citizens seeking admission as students to such institution because of race, religion, creed, color, or national origin.
>
> (c) To cause to be made any written or oral inquiry concerning the race, religion, color or national origin of a person seeking admission except that . . . This section is not intended to limit or prevent an educational institution from using any criteria other than race, religion, color or national origin in the admission of students.

The question is—

"Has the Commission abused its discretion or acted arbitrarily or capriciously or otherwise not in accordance with law in ruling that a request for a photograph before the prospective student is accepted for admission is an unfair educational practice under the "Fair Educational Practices Act." Prior to St. 1956 c. 334 the administration of the Fair Educational Practices Act was in the Department of Education and on August 10, 1956, was transferred to the Commission Against Discrimination.

I have studied the "Bulletin of Policies and Interpretations (January 1954) of the Massachusetts Department of Education" entitled "Equality of Educational Opportunity", the Bulletin of Policies, Interpretations, Rules and Regulations of your commission, relating to Fair Educational Practices, promulgated, after a public hearing, May 17, 1957, and I have compared G.L. (Ter. Ed.) c. 151B, and "Policies of the Massachusetts Commission against Discrimination" relating to employment practices (1946 to date).

A statute must be interpreted according to

the legislative intent appearing from the language thereof in connection with the subject matter and the object to be accomplished. Here the legislature specifically made a declaration of policy that "students otherwise qualified be admitted to educational institutions without regard to race, color, religion, creed or national origin . . .", and further declared that an exclusion, limitation or discrimination because of race, religion, creed, color or national origin or to cause to be made any written . . . inquiry concerning same was an unfair educational practice for an educational institution."

General Laws (Ter.Ed.) c. 4 section 7, thirty eighth, provides that in construing statutes "'written' and 'in writing' shall include printing, engraving, lithographing and any other mode of representing words and letters" with a special provision relating to a "written signature". See also Assessors of Boston v. Neal 311 Mass. 192, 194

> "The word 'photograph' is a combination of the Greek words photos, meaning light, and graphos, meaning writing, and a photograph is a light writing." Alpers v. United States 175 F.2d 137 at 138.

It appears that the statute is intended to prohibit the requirement of any form of information from which an educational institution might determine the race, creed, color or national origin of a student applicant. A picture could disclose the race, creed, color or national origin of a person, information which the statute forbids and would appear to come within the reference to 'written . . . inquiry prohibited in section 2(c) of said chapter 151C.

If it should be contended that the language of the statute is doubtful, then a construction put upon it or similar language by your commission is strong evidence of its meaning. See Malaguti v. Rosen 262 Mass. 555, 563; Scott v. Civil Service Commissioner 272 Mass. 237, 241.

I am therefore of the opinion, that a policy of interpretation by your commission that a request for a photograph by educational institutions before a prospective student is accepted for admission, is an unfair educational practice under the Fair Educational Practices Act, seems to be well within the phraseology of chapter 151C.

Very truly yours,

Samuel W. Gaffer
Assistant Attorney General

SWG/bka

EMPLOYMENT
Fair Employment Laws—Michigan

The director of the Michigan Fair Employment Practices Commission requested the opinion of that state's attorney general as to the validity of certain Michigan city ordinances enacted prior to the Michigan Fair Employment Act of 1955. The attorney general's opinion, reproduced below, stated that since the state had asserted its direct power over the field of civil rights in employment, municipal ordinances covering the same field must be regarded as superseded.

CIVIL RIGHTS: Discriminatory employment practices

FAIR EMPLOYMENT PRACTICES COMMISSION: Municipal Ordinances

Act No. 251, Public Acts of 1955, supersedes local ordinances dealing with discrimination in employment.

Opinion No. 2880 May 22, 1958

Mr. John G. Feild
Executive Director
Fair Employment Practices Commission
129 Mason Building
Lansing, Michigan

By Assistant Attorney General Virtue. Fair employment practices ordinances of the cities of River Rouge, Ecorse, Hamtramck and Pontiac are stated to have been enacted prior to the

Michigan Fair Employment Act,[1] which became effective October 15, 1955.

This statute provides, at section 1, that

> "The opportunity to obtain employment without discrimination because of race, color, religion, national origin or ancestry is hereby recognized as and declared to be a civil right."

In subsequent portions of the statute, certain unfair employment practices are defined and prohibited, a state commission is established to deal with the problem, and the powers and duties of the commission are set forth. The preamble states the purpose of the act to be:

> ". . . to promote and protect the welfare of the people of this state by prevention and elimination of discriminatory employment practices and policies based upon race, color, religion, national origin or ancestry; to create a state fair employment practices commission, defining its functions, powers and duties; and for other purposes."

An opinion is requested upon the following questions, arising by reason of the present co-existence of the statute above cited with the ordinances, each of which establish a municipal pattern for dealing with the same problem, that of discriminatory employment practices based upon race, color or creed. Your questions are as follows:

> "1. Was it the intention of the State Legislature to preempt that particular field of legislation and regulation to the exclusion of any existing or future local ordinances?
>
> "In the event that your answer to question number one is in the negative, the following question arises:
>
> "2. Does the difference between the State Statute and the local ordinances with regard to the administrative machinery, the manner of procedure, scope of coverage and the method of enforcement, constitute such an inconsistency on the part of the ordinances as to render the ordinances invalid?
>
> "In the event that your answer to question number two is in the negative, the following question arises:
>
> "3. Is a final determination by state or local Fair Employment Practices Commissions res adjudicata as to subsequent complaints concerning the same persons and subject matter previously heard or decided upon?
>
> "In the event that your answer to question number three is in the negative, the following question arises:
>
> "4. Does the State Fair Employment Practices Commission have the authority to pass a rule which would provide that once a complainant invokes the procedure of the State Fair Employment Practices Commission their jurisdiction shall be exclusive and a final determination therein shall preclude any other action, civil or criminal based on the same grievance of the complaint?"

Answering the first question, we note that section 2 of the statute defines the term "employer" to include "the state or any political or civil subdivision thereof, any person employing eight or more persons within the state and any person acting in the interest of an employer, directly or indirectly."

Unfair employment practices, as defined at section 3, include refusal to hire any individual because of race, color, religion, national origin or ancestry, as well as discrimination against any individual for any of these reasons. Certain specifically defined practices by employment agencies (such as classification and referral), by labor organizations (such as membership restrictions), and by employers are prohibited as discriminatory.

Section 4 requires that every contract to which the state or any of its political or civil subdivisions is a party shall contain a provision requiring the contractor and sub-contractors not to discriminate.

Section 5 establishes a state fair employment practices commission.

Section 6 sets forth the powers and duties of the commission, including the power to maintain a principal office in Lansing and "such other offices within the state as it may deem necessary"; to meet and function at any place in the state; to receive, investigate and pass upon charges of unfair employment practices; to hold hearings; to create advisory agencies, local or statewide; to make an annual survey; and to report to the legislature and governor once a year.

Section 7 authorizes the commission to prevent any person from engaging in unfair employ-

1. Act No. 251, Public Acts of 1955; §423.301 et seq CLS; §17.458(1) et seq. Stat Ann 1955 Cum Supp. Cf. OAG No. 2528, May 15, 1956, *Report*, p. 270 construing certain types of classified advertising with reference to this statute.

ment practices, first by informal persuasion, and if that fails, by issuance of an order after hearing and notice on written complaint. An appeal procedure to the circuit court from the final order of the commission is provided by section 8.

Section 10 directs the liberal construction of the act for the accomplishment of its purposes, and provides that "any law inconsistent with any provision hereof shall not apply * * *".

Attention is directed to the case of Attorney General v. Detroit,[2] holding that a city may not set up its own minimum wage system in competition and possible conflict with a system set up by a state statute. At p. 635, the court said:

> "That the State may regulate the hours of labor for the State itself and for its municipalities acting under delegated authority * * * is settled by Atkin v. Kansas, 191 U.S. 207 (24 Sup. Ct. 124). That case is bottomed upon the right of the State to declare a public policy for itself and its municipalities in the conduct of public work. We may further narrow the inquiry * * * (assuming that) the city may fix a public policy applicable to its matters of local and municipal concern, there is still left the question of the power of the city to declare a public policy applicable to matters of State concern. That the municipality performs dual functions, some local in character, the others as agent of the State, will be presently considered; and while this court from the beginning has vigilantly sustained the right of local self-government, it has with equal vigilances sustained the right of the State in the exercise of its sovereign power. Attempts of the State to meddle with purely local affairs of a municipality have been promptly checked by this court, and attempts of municipalities to arrogate to themselves power possessed by the State alone in its sovereign capacity must meet a like check at the hands of this court. *Neither may trench upon the power possessed by the other alone.*" (Emphasis supplied).
>
> At p. 638:
>
> "The police power rests in the State. * * * (No provision) of the home-rule act delegates to municipalities the general exercise of all of such police power. Nor do the constitutional provisions above quoted work such result. While the municipality in the performance of certain of its functions acts as agent of the State *it may not as such agent fix for the State its public policy* * * *.[3] (Emphasis supplied)
>
> At p. 640:
>
> "In the provisions under consideration the city has undertaken to exercise the police power * * * over matters of State concern; it has undertaken not only to fix a public policy for its activities which are purely local but also for its activities as an arm of the State. * * * If * * * the city possesses such of the police power of the State as may be necessary to permit it to legislate upon matters of municipal concern, *it does not follow that it possesses all the police power of the sovereign so as to enable it to legislate generally in fixing a public policy in matters of State concern.* This power has not been given it either by the Constitution or the home-rule act. * * *" (Emphasis supplied)

Upon this reasoning, the court granted an injunction against the City of Detroit to restrain enforcement of the minimum wage provisions of its charter and ordinance.

It is true that the *Detroit* case dealt with an ordinance affecting public employment only. There is no question, however, but that the protection of civil rights by preventing discrimination because of race, color and creed is a valid exercise of the state police power.[4]

The Statute under discussion, which makes protection against discrimination in employment a civil right, falls within the holding of the cases just cited.

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2. 225 Mich 631 (1923).

3. Citing City of Kalamazoo v. Titus, 208 Mich. 252 (compulsory rate-making power resides in the state); where the court said, p. 639: "Political experiment has not yet produced, in this State, the autonomous city,—a little State within the State * * * the legislative power of the State, and all of it, is reposed for exercise in a legislature; * * *" Citing also Clements v. McCabe, 210 Mich 207.

4. Bolden v. Grand Rapids Operating Corp., 239 Mich 318; Bob-lo-Excursion Co. v. People of State of Michigan, 333 U.S. 28, 92 L.Ed 455, 68 S.Ct. 358 aff'g 317 Mich 686. And see discussion of these and other cases in OAG No. 2524, June 4, 1956, *Report*, p. 296; OAG No. 2564, July 23, 1956, *Report*, p. 418, ruling that Act No. 182, Public Acts of 1956, providing for judicial revocation of license of violator of Civil Rights Law is constitutional.

Further, as has recently been pointed out in connection with the Michigan Fair Employment Practices Act, the outlawing of discrimination in employment has been established as within the police power of the state, as part of its power to declare and protect civil rights.[5]

See, for example, *Railway Mail Association v. Corsi*,[6] upholding the constitutionality of the New York Civil Rights Law as it forbids any labor organization to deny membership by reason of race, color, or creed. At p. 98, Mr. Justice Frankfurter, in his concurring opinion says:

> "Of course a State may leave abstention from such discriminations to the conscience of individuals. On the other hand, a State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment as a sword against such State power would stultify that amendment. Certainly the insistence by individuals on their private prejudices as to race, color or creed * * * ought not to have a higher constitutional sanction than the determination of a State to extend the area of non-discrimination beyond that which the Constitution itself exacts."

5. 35 MICH. STATE BAR JNL (May, 1956), 41; "The Michigan Fair Employment Practices Act," by Richard Mittenthal, at p. 42, citing cases.

6. 326 U.S. 88, 89 L.Ed 2072, 65 S.Ct. 1483 (1945). See also cases cited ff 7, p. 42 article cited in preceding footnote on this page. And see annotation at 44 ALR 2 1138, "Fair employment statutes designed to eliminate racial, religious, or national origin discrimination in private employment," citing Truax v. Raich, (1915) 239 U.S. 33, 60 L.Ed 131, 36 S.Ct. 7, holding that an Arizona statute requiring employers of more than 5 persons to employ not less than 80 per cent qualified electors or native-born citizens of the United States violated the equal protection guaranty of the fourteenth amendment, the court saying, in course of opinion, that the right to work for a living in the community is of the very essence of the personal freedom and opportunity that the fourteenth amendment sought to secure; that if this right can be refused solely on the ground of race or nationality; the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.

It follows, then, under the rule of *Attorney General v. Detroit*, discussed hereinabove, that inasmuch as the state has asserted its direct power over the field of civil rights in employment, therefore municipal ordinances covering the same field in competition and conflict with the state statute, must be regarded as superseded and inoperative.[7]

In defining "employer", in defining prescribed practices, and in prescribing methods for dealing with discriminatory practices, the ordinances are in competition with the state statute, which affords a complete statewide mechanism for dealing with the evil which is the subject of the legislation. We point again to the provisions of section 2, defining "employer"; section 3 defining "unfair employment practices"; section 6, authorizing the state commission to establish offices anywhere in the state as it may deem necessary, to function at any place within the state, and to create local or statewide advisory agencies; and section 7 and 8 setting up methods for "preventing any person from engaging in unfair employment practices."

We think it clear that the complete machinery provided by this legislation can function clearly and effectively only if unthwarted and unconfused by competing and duplicating mechanisms previously established by local ordinances. Where, as here, a state statute asserts plenary control of the subject matter of the legislation, it must follow that city ordinances dealing with such subject matter are void. The state has "pre-empted" the field, in the sense that the authority to be exercised under the act is plenary, leaving nothing in that respect to local municipalities for regulation pursuant to the police power.

PAUL L. ADAMS
Attorney General

7. See McQuillin, Municipal Corporations, (3rd ed.) Vol. VI, §21.32, at p. 237, and cases cited, including National Amusement Co. v. Johnson, 270 Mich 613; Richards v. City of Pontiac, 305 Mich. 666; Grand Haven v. Dairy Co., 330 Mich. 695, where, at p. 702, the court states that the legislature has "pre-empted" the pertinent field of law. Cf. Gust v. Twp. of Canton, 337 Mich. 137. See also OAG No. 1646, April 2, 1953, 52-54 *Report*, 139, 141.

CRIMINAL LAW
Enforcement—California

The Attorney General of California appointed an advisory committee to prepare a report so

that material could be provided to assist law enforcement officers in coping with interracial problems. Excerpts from the resulting manual, a "Guide to Community Relations for Peace Officers," are reprinted below:

PREFACE

The recent racial conflicts identified with Little Rock, Arkansas, and those existing in other areas of the United States, have heightened and brought about a reawareness of the potential problems which may confront law enforcement in California. The reported increase of community tensions throughout our Country, in varying degrees, has prompted peace officers throughout California to request additional copies of the pamphlet entitled "Guide to Race Relations for Peace Officers" published by me in 1952 and distributed to law enforcement officials throughout the State. This document is now out of print. Consequently, I appointed an advisory committee to consider the total problems of interracial, interreligious and community tensions in order that a new guide or manual might be prepared to assist all law enforcement officers in coping with whatever community tensions may hereafter arise in their respective communities. It is fully realized that conditions will differ from city to city and from county to county and that each condition and area must be appraised and dealt with accordingly. We recognize further that efforts toward prevention are of paramount concern—for this reason the preparation of the committee's report has been entrusted to Assistant Attorney General Emmet Daly who serves as Chief of the Crime Prevention Bureau of the Attorney General's Office.

EDMUND G. BROWN
Attorney General
State of Califorina

* * *

CHAPTER II

1. Why are community relations of interest to the peace officer?

Respect for the peace officer, and the law he represents, by the people of his community, and particularly by people of every ancestry, is probably the best insurance we have against the breakdown of law and order. This community respect is built up through favorable contact and a good performance record. The key toward gaining community respect is to treat all individuals the same—with fairness, impartiality, honesty, courtesy and firmness. Differential treatment leads to defiance and misunderstanding on the part of those who are discriminated against. People who have been on the receiving end of discrimination cannot help becoming sensitive to indications of prejudice. Some will even read prejudice into perfectly innocent remarks or gestures. To obtain the cooperation and trust of such a person, it helps to know some of the more obvious mistakes to avoid. This should all be of interest to the peace officer because:

a. In law enforcement we do not always work with tangible products, but rather in the complex field of human behavior.
b. Tensions between community groups are a constant threat to community peace and order.
c. When these tensions develop to a point of actual riot, no one wins. No matter what happens then, too often the peace officer gets the blame.

2. *What should be the official attitude of the law enforcement agency?*

a. Have a well-defined and workable public relations policy in effect—and then enforce it.
b. Treat all people fairly, honestly and impartially.
c. All police action should be related to the incident and the persons involved according to the degree of their involvement.
d. Understand the different backgrounds of your various community groups, their prejudices, and their problems.
e. The official attitude of the department should be outlined to the entire force.
f. Where conditions and personnel permit, a Field Services Unit, or other designated unit, should be established. This unit would be specifically charged with the responsibility of maintaining continuous, frequent, and around-the-calendar personal contacts with community relations agencies, allied agencies, press, fraternal groups, church leaders, school officials, and others. Through such liaison, potential trouble spots may be determined before they develop into open conflict.
g. Encourage your community leaders to

become active in doing the teaching assignment of getting various segments of the community to understand each other and get along together.

h. If and when a crisis arrives and positive police action becomes imperative, inform these leaders of intended police action and enlist their support.

3. *Why is this official attitude important?*

a. Citizen and community respect is dependent upon the impartial exercise of authority.
b. Lack of confidence in, or lack of appreciation for, the department's attitude on the part of community groups or its members, destroys respect for the police agency.
c. Charges of discrimination, brutality, violation of "Civil Rights," and partiality in the enforcement of law, result in lack of confidence in our law enforcement agencies.
d. Even when these charges are proven to be unfounded or untrue, this lack of confidence, once established, leads to lack of community support.
e. When any portion of the community lacks confidence in its law enforcement agency's attitude toward the problems of its group, too often members of that group will then work actively to hamper law enforcement, thereby reducing the total effectiveness of otherwise good law enforcement.

4. *How may community tensions be recognized?*

There are alarm signals which may be indicative of pending or impending tensions—among these the following may be considered:

a. The appearance of threatening or derogatory signs, pamphlets or leaflets in commercial and public places.
b. An increasing number of rumors together with an increase in their sensational character.
c. An increasing number of incidents of violence or threats of violence.
d. Increasing activity or statements by known or recently "imported" agitators.
e. Growing distrust of all law enforcement, or any particular department thereof, by one or more segments of the community.
f. Increase in number of charges and complaints of alleged police brutality.
g. Minority or community press reactions to the existence of increasing tension.
h. The circulation of "hate" literature.
i. The holding of protest meetings.
j. Public name-calling and other attempts toward provocation.
k. Increased number of acts involving malicious mischief and gang fights by juveniles—particularly if the juveniles of minority group backgrounds are involved.
l. Disturbances at public entertainment places.
m. Raids by juveniles or adults on neighborhoods and party crashing.
n. Threats and attacks on the private property of others.

5. *What should the peace officer do where tensions are evident?*

a. Maintain a thorough, respectful, firm, and professional attitude in each contact.
b. Exercise absolute impartiality in each contact.
c. Enforce the law against all violators without regard to race, color, creed or national origin.
d. Be neutral, unbiased and inquiring.
e. Treat each contact as an individual, not as a representative of a stereotype group.
f. Guard against your own prejudices and keep them out of the performance of your duties.
g. Avoid contributing to the problem by abstaining from endorsing or repeating rumors or adding fuel to the "fire" by careless action or talk.
h. Avoid the use of terms, adjectives and names which are insulting to others.
i. Know and develop friendly and respectful relations with your community leaders.
j. Each officer should be responsible for serving as the eyes and ears of the enforcement agency in the field of human relations and racial tensions.

• • •

APPENDIX A

EXAMPLES OF COMMUNITY TENSIONS

It is the opinion of this committee that it might prove helpful to law enforcement officials throughout the State who might be contemplat-

ing a training program, to have some concrete examples of tensions which exist in a community and the role which the police department played in their attempt to alleviate the existing tensions. Because of the somewhat unique population increase in Los Angeles City and its resultant tensions, we have selected three separate situations which were handled by the Los Angeles Police Department. The following data was submitted by William H. Parker, Chief of Police.

Case I. In the southwest area of Los Angeles, a former all-Anglo community began changing as members of minority groups crossed an imaginary boundary line to the east and moved into the community proper.

Rumors of tension reached the police department, community organizations and the schools in the area which were directly affected. There were no acts of violence in the community among the adults, but soon acts of violence at the schools broke out.

The Negro students at the schools had in the past been very much in the minority, and over night it seemed as though their ranks had swelled to the point of approaching the 50 percent mark. This realization of strength on the part of the Negro students, combined with rumors of abuse at the hands of the Anglo students and members of the faculty (some rumors had some basis, most were circulated without foundation) caused a few to retaliate.

Gangs were formed (Negro gangs and Anglo gangs—the latter supposedly for protection) and incidents of battery, ADW, gang fights and threats became a daily occurrence around the area.

The community organizations (P. T. A., Parent Councils, etc.) became alarmed and began working on the problem on the adult level. The police department maintained patrols around the schools to minimize incidents. The community problems unit (juvenile officers working directly on the problem of gangs and race tensions) attacked the problem by identifying the gangs involved, learning their membership, bringing the leaders out in the open, securing information and evidence leading to the arrest of the agitators and investigating all rumors in order that fact might be separated from fiction. Investigation of rumors played a very important part in that many rumors were the basis (or excuse) for most acts of violence by one group against another.

The "eye" of this social hurricane was a junior high school which had undergone a tremendous change in the racial composition of the student body. Here, all incidents or disagreements between two students of different ethnic backgrounds became racial conflicts instead of just two students differing on something which was originally nonracial. Each incident became a new rumor.

The police department, working with the schools, community agencies and community organizations, brought about an easing of tension in the community and the schools, until today this particular junior high school is enjoying a normal routine and has had less problems of a racial or cultural nature than the other junior high schools.

Case II. Another junior high school in the southwestern part of Los Angeles, undergoing a similar change as the junior high school mentioned above, but on a slower moving pace, became the focal point of police activity, due to rumors of gang fights between Anglo and Negro students.

These rumors attracted many nonstudents from other areas of Los Angeles (some as spectators—others prepared for participation). Rumors were circulated among the Negro students that the Anglo boys were "patting" the Negro girls on their posteriors, in the hallways. This same rumor was circulated among the Anglo boys with the Anglo girls being the victims. With the co-operation of the school officials, the Community Problems Unit investigated the rumors and failed to disclose a single "victim" on either side. The unit then met with student leaders, both Negro and Anglo, and brought the rumor "out in the open" along with the results of their investigations. It was impressed upon these leaders that all rumors coming to their attention should be made known to the boy's or girl's vice principal, who in turn called the Community Problems Unit. Through such co-operation with the police, schools and key students within the schools, a good system of preventive action minimized many tense situations.

Case III. In the northeastern part of Los Angeles a three-way tension exists, Negro, Anglo and Mexican-American. The community had for many years experienced tensions between Anglo

and Mexican-American citizens, but after World War II many Negroes began moving into an area which had at one time been populated almost entirely by Mexican-Americans.

Tract homes sprung up, selling almost entirely, to Negro buyers. The playgrounds in the area and the schools were affected by this migration of Negroes into the community. Parent's groups (Anglo) protested to the playground officials and the schools suggesting that the Negroes be kept out of the playgrounds. Ill feelings on all sides reached the boiling point many times, but due to the co-operation of the police, school and other community agencies, most of the action taken was preventive.

* * *

The following data was submitted by Francis J. Ahern, Chief of Police of the City and County of San Francisco:

In June of 1954, in accordance with the United States Supreme Court's decision with reference to integration in public housing projects, members of this department met in conference with officials of the Housing Authority in order to prepare a plan relative to this matter. At that time there were 14 such housing projects; eight were lived in only by members of the white race; one project was allocated for Chinese residents; two projects were allocated for Negroes, and three projects were allocated for mixed colored and white tenants.

An inspector of this department was designated as a liaison officer between the police department and the Housing Authority. Arrangements were made so that this liaison officer would be kept informed whenever a member of a different race would move into a project and he in turn would notify the district police station. At the precinct level, company commanders, who had also met in conference in regards to this problem, had established by written order proper procedures to be undertaken by the police to prevent any disturbances or incidents. The salient features of these procedures were to have men in civilian dress on hand at the scene to observe, with uniformed officers alerted and a short distance away but who would move in immediately in case of trouble. We felt that the attendant presence of uniformed police would attract unnecessary attention to the situation wherein the desired atmosphere would be one of normalcy.

After the moving-in period, patrol was maintained by radio car officers patrolling in a casual manner but at the same time being alert to any possibilities of an incident. Continuous contact was maintained at the same time between the individual housing projects and the district police stations after the moving-in period relative to any friction between the older tenants and the members of the minority group that had just moved in.

To the knowledge of the police department not a single disturbance or incident was reported at any of the housing projects and integration was successfully accomplished.

* * *

REFERENCE

School Closing Plans

I. Introduction

When the United States Supreme Court held that school segregation laws are unconstitutional, the pronouncement came in cases involving public schools in Kansas, Delaware, South Carolina, Virginia and the District of Columbia.* Before the 1954 decision the immediate background of constitutional development showed concern with the rights of a person under the Fourteenth Amendment to be admitted to state-operated colleges and universities without racial discrimination.** This, in turn, reflected the general doctrine in constitutional law that "merely private" discrimination does not violate constitutional rights and that "state action" is required before rights under the Fourteenth Amendment are infringed. See *State Action*, 1 Race Rel. L. Rep. 613 (1956). It has been widely assumed that these factors support the proposition that the principle of the *School Segregation Cases* can be legally avoided by a state withdrawing from the field of education. A dictum in *Briggs v. Elliott*, 132 F.Supp. 776, 1 Race Rel. L. Rep. 73, 74 (E.D.S.C. 1955), has been utilized in support of the same thesis:

> "The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation."

Accordingly, certain of the southern states have enacted legislation which provides for assignment of students according to choice and for the state's abandonment of educational functions or their transfer to private interests.

It is the purpose of this study to examine various measures apparently designed to main-

* *The School Segregation Cases*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, 1 Race Rel. L. Rep. 5 (1954), 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, 1 Race Rel. L. Rep. 11 (1955).

** *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950), and see 1 Race Rel. L. Rep. 283 (1956).

tain racial segregation in education, while yet complying with the mandate of the Supreme Court, by withdrawing the state from the field of public education and, usually, by providing also for the transfer of educational functions to private institutions. These plans may provide for the complete withdrawal of the state from public education, for the closing of a particular public school upon the happening of some contingency—such as court-ordered integration or the use of federal troops to enforce integration orders—for payment of tuition grants to students or to private educational institutions, or for the lease or sale of the public school facilities to a private institution or group. In some instances separate statutes have been passed concerning isolated phases of the problem, but more commonly the procedure has been to enact "package" legislation which has the effect of setting up an over-all plan for meeting any efforts made to bring about racial integration of the public schools. See, *e.g.*, North Carolina Advisory Committee on Education Report, 1 Race Rel. L. Rep. 581 (1956); Virginia Commission on Public Education ("Gray Commission") Report, 1 Race Rel. L. Rep. 241 (1954). In the following discussion the more significant of the statutes relating to the discontinuance of public education will be classified separately, but it is to be remembered that many of the individual enactments are constituent parts of comprehensive legislation.

II. State Abandonment of Public Education

A. Types of Plans

Legislation providing for the states' withdrawal from the field of public education falls into several categories. The plans may provide either for complete abandonment of public educational functions, or only for the closing of one or more public schools upon the happening of a specified condition. The latter appears to be the more common provision. The closing of the public schools, whether complete or partial, generally is to take place only upon the happening of certain contingencies. One type of plan calls for the closing of schools which are integrated voluntarily or by a court order, while another related plan requires the closure of schools at or around which federal troops are stationed.

In addition to these school abandonment plans several other types of measures have been adopted which may indirectly require school closing. One such measure provides for the withdrawal of state funds from any racially integrated school, and is generally coupled with a provision which allows the funds withdrawn to be used to provide tuition grants to students (see discussion, *infra*). Moreover, many of the states have provided for the suspension of compulsory school attendance laws, usually upon the integration of the schools.

1. The Closure of Integrated Schools

Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Virginia have legislation which may be used to close public schools at which racial integration is imminent or has taken place.

Florida

Florida has a general statute giving the county boards of public instruction authority to close the schools during an "emergency." F.S.A. § 230.23(4)(f) (1957 Supp.). This statute, although amended recently in other particulars, was enacted prior to the time when racial integration furnished a motivation for public school closing plans. While not specifically dealing with racial integration, it might presumably be invoked to close an integrated school. Whether this result follows, however, will depend upon the circumstances surrounding the integration of a public school—*e.g.*, the presence of violence—and the interpretation of the term "emergency."

South Carolina

The plans of the other states, however, generally make school closure expressly dependent upon the integration of the public schools. South Carolina, whose plan directly concerns colleges and universities, specifically enumerates the state-supported colleges and universities affected:

> "All appropriations for colleges and institutions of higher learning being made on the basis of racial segregation, the boards of trustees or other governing bodies of the University of South Carolina, The Citadel, Clemson College, Winthrop College, State Medical College and South Carolina State

College are each hereby directed to close its said institution upon any pupil being ordered admitted immediately to it by the order of any Court, and to keep it closed while the pupil presents himself or herself for admittance, or until the court order is revoked.

"*Provided, However,* if any one of the State supported institutions of higher learning herein designated, other than South Carolina State College, shall be forced to close as a result of a pupil being admitted by any Court order, the South Carolina State College [for Negroes] shall likewise be closed until such time as the other institution is opened." Act No. 813, General and Permanent Laws of South Carolina, 1956, Part II, Sec. 3, 1 Race Rel. L. Rep. 731.

South Carolina also has a provision which would apparently authorize the boards of trustees of the public school systems to close schools at which integration has taken place:

"The board of trustees shall also:

". . . .

"(7) *Control educational interests of district and operation of schools.* Manage and control local educational interests of its district, with the exclusive authority to operate or not to operate any public school or schools . . . ." S.C. Stat. § 21-230 (1957 Supp).

Louisiana

The Louisiana Legislature recently enacted legislation which authorizes the governor to close the public schools. Act No. 256, 3 Race Rel. L. Rep. 778 (1958). Section 1 of that Act provides:

"The Governor of the State of Louisiana, as the Chief Magistrate, in order to secure justice to all, preserve the peace, and promote the interest, safety and happiness of all the people, is authorized and empowered to close any racially mixed public school or any public school which is subject to a court order requiring it to admit students of both the Negro and the white races by a date certain, and fix the effective date of such closing. The Governor is further authorized and empowered to close any other schools in any parish or city school system where a school has been closed under the provisions of this section if in his opinion the operation of such school or schools might cause friction or disorder among the school children or citizens of said system or result in a breach of the peace, civil disorder or strife."

Virginia

The Virginia plan is probably the most comprehensive, and many of the other plans are patterned after it. It provides, first, that the public policy of Virginia requires the maintenance of racial segregation; further, the Act declares that the "preservation of her [Virginia's] public education," requires "that there be uniformity of action throughout the State" with regard to any instance of racial integration of the public schools. Chapter 68, 1956 Extra Sessions Laws, Section 1-2, 1 Race Rel. L. Rep. 1103 (1956). Section 3 of the Act in effectuating this public policy, then provides:

". . . the Commonwealth of Virginia assumes direct responsibility for the control of any school, elementary or secondary, in the Commonwealth, to which children of both races are assigned and enrolled by any school authorities acting voluntarily or under compulsion of any court order."

In addition to divesting the school boards of authority over the schools, this section also provides for the closing of any public school at which integration takes place and removes it from the public school system. Authority over "such school, its principal, teachers, and other employees and all pupils then enrolled or ordered to be enrolled, shall be and is hereby vested in the Commonwealth of Virginia to be exercised by the Governor. . . ." Section 4 of the Act contains the heart of the school closing provisions:

"Immediately upon such control, power and authority becoming vested in the Commonwealth of Virginia, . . . such school is closed, and shall not be reopened, as a public school, until in the opinion of the Governor, and after an investigation by him, he finds and issues an executive order that (1) the peace and tranquility of the community in which the school is located will not be disturbed by such school being reopened and operated, and (2) the assignment of

pupils to such school could be accomplished without enforced or compulsory integration of the races therein contrary to the wishes of any child enrolled therein, or of his or her parent or parents, lawful guardian or other custodian."

The Governor is authorized to re-organize the schools if after investigation he concludes that it cannot be reopened under section 4, and if he further finds that he cannot reopen the schools after re-organization, the school is to remain closed and the Governor may make other provision for the instruction of the children affected. Sections 5 and 6. The Act also provides for tuition grants, (See discussion, *infra*), and the Governor has authority to reopen the school and return it to the local school system at any time it appears that such can be accomplished in accordance with the provisions of the Act. Section 10 of the Act, recently amended by Chapter 631 of the Virginia Session Laws, 3 Race Rel. L. Rep. 340, (1958), provides for the return of the closed school to the local system:

"Notwithstanding any other provision contained in this act, if after investigation the Governor concludes, or, at any time the school board* *and* board of supervisors of the county or the council of the city in which the closed school is located, certifies to the Governor by resolution that in* *their* opinion such school cannot be reopened, or reorganized and reopened, in conformity with provisions of this act, the Governor* *may* so proclaim, in which event the said school shall again become a part of the public school system of the political subdivision in which it is located, and such school, elementary or secondary, shall along with all other schools of its class in the political subdivision in which it is located thereby become subject to the applicable provisions of the laws of this State." (asterisks and italics indicate amendments).

Section 13 declares that all action authorized and taken under the Act is the action of the General Assembly and that all acts of the Governor are taken on behalf of the "sovereign Commonwealth of Virginia," specifically withholding consent to suit against the state for any acts taken under this statute. See *The Eleventh Amendment*, 2 Race Rel. L. Rep. 757 (1957), for a discussion of the State's immunity from suit.

Mississippi

The Mississippi Legislature recently enacted similar legislation, giving the Governor discretionary power to close the public elementary or secondary schools or institution of higher learning. S. B. 2079, 1958 Session Laws, 3 Race Rel. L. Rep. 353. Under section 1 of this Act, the Governor is given authority:

"... to close any one or more or all schools in any school, agricultural high school, or junior college district, or any institution of higher learning in the State of Mississippi when, in his discretion, he determines such closure to be to the best interest of a majority of the educable children of any public school district or to the best interest of a majority of the children or persons eligible to attend any agricultural high school, or agricultural high school and junior college district, or to the best interest of any institution of higher learning, or to the best interest of a majority of the persons or children enrolled in any such school or schools, or any agricultural high school or agricultural high school and junior college, or any institution of higher learning. The said governor as such is also vested with such supplemental and additional authority to close any one or more or all of said public schools in any such school district, or agricultural high school district, or agricultural high school and junior college district when, in his discretion, he determines such closure will promote or preserve the public peace, order, or tranquility of such district or districts and as such governor he is also vested with the authority to close any one or more or all of said institutions of higher learning when, in his discretion, he determines such closure will promote or preserve the public peace, order, or tranquility in and of such institutions, or the community in which such may be situated or in or of the State of Mississippi."

Section 2 of the Act provides that the schools shall remain closed until the Governor issues a proclamation reopening them. The remainder of the Act deals with the effect of closing the schools upon such matters as teacher retirement, transportation facilities, etc. One other important provision should be noted. Section 4 provides that the provisions for school closing

"shall not operate to prevent four (4) months of free public school, as required by Section 205 of the Mississippi Constitution, but the board of trustees shall determine when such four (4) months of free public schools shall be had, in the event such school or schools are closed and not reopened as provided for in this Act." This provision is to be null and void upon the repeal of section 205, Article 8, of the Mississippi Constitution or upon the abolition of the public schools under section 213-B, Article 8, of the Mississippi Constitution, *infra*. It is to be noted that section 213-B provides a plan for abandonment of public education itself, for it provides that the legislature may "abolish" the public schools.

North Carolina

North Carolina has adopted a plan whereby the local board of education may close any or all of the public schools within its jurisdiction. In addition, the Act provides for an election within the administrative unit to determine whether the schools shall be closed. 1956 Extra Session Laws c. 4, 1 Race Rel. L. Rep. 934. See also N. C. Const. Art. IX, Sec. 12, 1 Race Rel. L. Rep. 928 (1956). In section 1 the General Assembly sets out the "legislative policy and purposes," and after declaring that education must always be encouraged, provides:

> "It is further recognized that our public schools are so intimately related to the customs and feelings of the people of each community that their effective operation is impossible except in conformity with community attitudes. Our people in each community need to have a full and meaningful choice as to whether a public school, which may have some enforced mixing of the races, shall continue to be maintained and supported in that community. It is the purpose of this Act to provide orderly procedures, consistent with law, for the effective expression of such choice."

Section 3 of the Act gives the local boards of education authority to close the schools:

> "The board of education of any administrative unit may, pursuant to the provisions of this Article, suspend the operation of one or more or all of the public schools under its jurisdiction."

Section 5 provides for the local option elections:

> "Any board of education may at any time, by resolution of a majority of the members, call all for an election on the question of closing the public schools within a local option unit which is under that board's jurisdiction; provided, that an election shall be called by the board when a petition signed by at least fifteen per cent (15%) of the registered voters residing within the local option unit is presented to the board requesting such an election. When a majority of the votes cast in such election are in favor of suspending the operation of the schools in such local option unit, the board of education shall suspend the operation of such public schools."

The board of education is also authorized in a comparable manner to call an election to determine whether a closed school is to be reopened. If during any particular year there has been an election on the question of closing or reopening the public schools, the board is given discretion by section 7 to determine whether to call another election upon the presentation of a petition meeting the requirements of sections 5 and 6.

Georgia

Act No. 11 of the 1956 Session of the Georgia General Assembly, 1 Race Rel. L. Rep. 418, provides for the closing of public schools by the Governor when he finds that the public school is no longer entitled to state funds. This Act, coupled with the General Appropriations Act for the fiscal year 1957, H.R. No. 243, 1 Race Rel. L. Rep. 421 (1956), which provides, *inter alia*, that no funds appropriated shall be used for any racially integrated school, requires the Governor, in effect, to close any integrated public school:

> "That whenever the Governor shall ascertain that the public schools of any county, city or independent school district within this State are not entitled under the laws of this State to State funds for their maintenance and operation, or whenever the Governor shall ascertain that the public schools of any county, city or independent school district cannot be operated in such manner as shall entitle such schools under the laws of this State to State funds for their maintenance and operation, he shall in either such event by executive order, make public proclamation of the fact so determined by

him, and thereupon the public authorities of such county, city or independent school district shall no longer be authorized to operate the public schools of such county, city or independent school district after the effective date named in such executive order; and the Governor shall by such executive order provide for the closing of such schools and for the preservation and protection of the school properties, and such public schools shall thereupon be closed and such properties preserved and protected as provided in such order. . . . The Governor may order the public schools of any county, city or independent school district closed without closing the public schools of any other county, city or independent school district, and he may close the public schools of several counties, cities or independent school districts by one order."

2. School Closure in Event of Use of Federal Troops

Legislation providing for the closure of any public school at or near which federal troops are stationed was proposed shortly after federal troops and the federalized Arkansas National Guard were sent to Little Rock, Arkansas, to remove "an Obstruction of Justice Within the State of Arkansas," Executive Order 10730, 22 F. R. 7628, 2 Race Rel. L. Rep. 964 (1957). Florida, Texas, and Virginia have adopted similar forms of these so-called "Little Rock" bills.

The Florida and Virginia statutes are essentially the same. Fla. Session Laws, c. 1975, 2 Race Rel. L. Rep. 1149 (1957); Va. Session Laws, c. 41, 3 Race Rel. L. Rep. 341 (1958). Both of these statutes begin with a declaration that the state's public policy opposes the use of federal troops to prevent violence and maintain peace at or in the vicinity of public schools. Section 1 of the Florida statute then provides:

"In the event the National Guard or any other military forces or personnel are employed or used upon the order or direction of any federal authority on public school properties of this state or in the vicinity of any public school in this state to prevent acts of violence or alleged acts of violence precipitated or alleged to be precipitated by the operation of said school or student or students attending such school, said school shall be closed automatically and its operation suspended so long as said troops remain on such school properties or within the vicinity of said school."

The remainder of the Florida statute gives to the boards of public instruction authority to take all steps necessary to close the public schools and to provide for the transfer of pupils enrolled in the closed school to other schools if the parents or guardians of the pupil requests such transfer. For the purposes of the compulsory school attendance laws the students enrolled in the closed school are to be counted "present" during the period the school is closed.

Section 2 of the Virginia statute makes provision for the closing of the schools:

"Whenever, except upon application of the General Assembly of Virginia or the Governor, made under the provisions of Article IV, Section 4, of the Constitution of the United States, any military forces or other personnel pursuant to the order or direction of any Federal authority enter upon the premises of any public school, or in the vicinity thereof, for the purpose of policing its operation, or to prevent acts of violence or alleged acts of violence, the school shall thereupon automatically be closed and its operation suspended."

Once the schools have been closed under this section of the Virginia statute, the governor is to assume control over the schools and to exercise his authority under the general school closing statute, *supra*. In addition to the authority conferred by this Act, chapter 319 of the 1958 Virginia Session Laws, 3 Race Rel. L. Rep. 342 (1958), extends the provisions of chapter 41 to other schools in the same school district:

"(a) If the entry upon the premises of any public free school, or the vicinity thereof, by military forces or other personnel under federal authority, or (b) the closing of any such public school as a result thereof, should in the opinion of the Governor, cause the peace and tranquility of the school division in which any such school is located to be disturbed, or should cause the orderly administration of the educational process to be disrupted or disturbed in any other school or schools located in the same school division, the Governor is hereby authorized and empowered, in his discretion, to close any other such school or schools located in the same school division, irrespective of

whether or not such other school, or schools, so located are being policed by any Federal authority."

This Act also provides that the Governor's authority after the schools have been closed is to be that conferred by the general school closing statute, *supra*.

The Texas legislation is somewhat different from that of Florida and Virginia in that it not only provides for the closure of schools at which federal troops are used, but also for the closure of any school at which it is necessary to use military force, state or federal, to maintain peace and order. S.B. 1, Second Special Session, 1957, 3 Race Rel. L. Rep. 87. Section 2 of the Texas Act provides that although the Governor of the state is to assist local authorities "to prevent violence and maintain peace and order in the operation of public schools," neither the Texas National Guard nor other military forces may be used "for direction or control of the operation, or attendance at such schools." The local school board is given authority to close any school if it or the Governor of Texas finds that military force is necessary to maintain peace and order. Section 2½ requires the Governor to close a public school upon certification from the school board having jurisdiction that violence or the danger of violence cannot be prevented except by the use of military force, and requires him to keep the school closed until the school board certifies that closure is no longer necessary.

The use of the Texas National Guard or other military or enforcement forces under federal authority is dealt with in section 3:

> "In the event the National Guard or any other military troops or personnel are employed or used upon order of any Federal authority on public school property or in the vicinity of any public school for direction or control of the order, operation, or attendance at such school, the school board having jurisdiction may close the school and suspend its operation so long as said troops remain on or within the vicinity of the school for any of such purposes."

3. Withdrawal of Public Funds

Legislation prohibiting the use of public funds for the support and maintenance of racially integrated public schools is somewhat similar to the statutes requiring the closure of the schools upon integration, since the end result will generally be the closing of the schools affected. However, some states have enacted both types of legislation.

Statutes requiring the withdrawal of public funds from integrated schools may take one of several forms. First, the general appropriations act of the state may contain a limitation that the amounts appropriated for the support and maintenance of the public schools shall not be used for integrated schools. It would seem that this type of provision is effective only during the fiscal period involved. Secondly, the state may establish a permanent statute prohibiting appropriations or the expenditure of public funds for the maintenance and support of racially integrated schools. Finally, the statute, of a permanent nature, may provide that racially segregated schools are to be maintained and that failure to comply with this provision will deprive the school affected of various parts of the funds received from the state—*e.g.* funds for free textbooks or funds derived for a permanent trust fund.

It is to be noted that the provisions for tuition grants to pupils to attend private, nonsectarian schools are generally contained in this type of legislation, the statute declaring that the funds withheld are to be used for that purpose. These provisions will be discussed below.

Both Georgia and Virginia have used the device of specifically limiting appropriations to the public schools to racially segregated schools by provisions in the general appropriations act. The Georgia General Appropriations Act, Section 7 (a), for the fiscal year 1957, 1 Race Rel. L. Rep. 421 (1956), provided that "the appropriations made in this section [Section 7] for the benefit of public schools are limited to the public schools within such school districts as shall provide separate schools for white and colored children throughout the entire district." This section further provides that the appropriations are to be considered separate as to each school supported and maintained thereby, and that the appropriation shall be null and void if any of the events set forth in the subsection (d) occur:

> "(d) In the event of the prosecution to effective judgment of a suit in respect of any public school district resulting in determination by a court of competent jurisdiction that any portion of this Section 7 is unconstitutional, or that the public authori-

ties in charge of the public schools within such district may not provide separate schools for the white and colored races within such school district as is required by Article VIII, Section 1, Paragraph I of the Constitution of this State, and in the manner provided by subsection (a) hereof, the State Board of Education shall have no power to make any apportionment for the benefit of any of the public schools within such school district, and the State Budget Authorities shall have no power to make any part of the appropriation provided in this Section 7 or any other funds available to or for the benefit of such public schools; and if such effective judgment shall occur after apportionment made to such public schools by the State Budget Authorities approving the same, no further funds from such apportionment to such public schools shall be paid by any officer of this State. The Governor shall by written order determine when any such judgment has become effective."

Section 8 of the Georgia Act places essentially the same limitations on appropriations for the institutions of higher education supported and maintained by the state.

Chapter 71 of the Acts of the 1956 Extra Session of the Virginia General Assembly amended the biennium appropriation act, limiting the application of funds appropriated for various educational purposes to "efficient elementary and secondary schools" and defining "efficient" schools as those in which there is no racial integration of pupils. 1 Race Rel. L. Rep. 1112 (1956). This provision was continued in Virginia's current appropriations act, Chapter 642, 1958 Session, 3 Race Rel. L. Rep. 767.

Georgia, in addition to the limitation imposed in the appropriations act, has a permanent statute prohibiting the appropriation or expenditure of state funds for racially integrated public schools. Ga. Code Ann. §§ 32-801, 804, 32-9918 (1957 Supp.). The basic section, 32-801, provides:

"No State or local funds derived from taxation or otherwise, shall be appropriated, paid out, used, or in any wise expended, directly or indirectly for the maintenance, upkeep, operation, or support of any public school district or system in this State which does not provide separate schools for white and colored children throughout the entire district or system and in which all the white and colored children attending public school do not attend separate schools; nor shall any such money be appropriated, used, paid out, or in any wise expended, directly or indirectly, for the payment of any salary or compensation of any nature or character whatsoever to any teacher, instructor, employee or official of any public school district or system instructing mixed classes of white and colored children or in any wise concerned in the maintenance, upkeep, support or operation of any public school district or system which does not maintain and provide separate public schools for white and colored children throughout the entire district or system and in which all the white and colored children attending public schools are not educated in separate schools: Provided, however, that the provisions of this section shall not apply to the annual capital outlay funds allotted to the local school units as referred to in the general Appropriations Act approved February 20, 1953, or to any funds hereafter appropriated for capital outlay purposes, nor to funds for payment of principal or interest on any bonded indebtedness."

Section 32-802 of the Georgia Code prohibits the approval by the State Board of Education or the State Superintendent of Schools of budgets submitted by school districts unless the budgets expressly provide that "all items of proposed expenditure set forth therein shall lapse and become void in the event separate schools for white and colored children should not be maintained and operated in the school district, system, or unit." Section 32-803 provides for the personal liability of any public official who pays out funds in violation of these provisions and section 32-804 makes these sections applicable to all public school systems in the state. Finally, section 32-9918 provides that any person violating the provisions of the Georgia Act is guilty of a felony and subject to imprisonment in the state penitentiary.

South Carolina has a somewhat similar statute, but makes the withdrawal of public funds contingent upon the transfer of a pupil on order of any court. S. C. Code § 21-2, 1 Race Rel. L. Rep. 241 (1956). See also Act No. 813, Part II, § 3, 1 Race Rel. L. Rep. 731 (1956) (quoted *supra.*) Section 21-2 provides:

"Appropriations of State aid for teachers'

salaries, and all other school district, county and State appropriations for the operation of the public school system, shall cease and become inoperative for any school from which, and for any school to which, any pupil may transfer pursuant to, or in consequence of, an order of any court, for the time that the pupil shall attend a school other than the school to which he was assigned before the issuance of such court order."

Title 17, sections 331-34 of the Louisiana Revised Statutes, 1 Race Rel. L. Rep. 239 (1956), provides, first, that racial segregation of the public schools must be maintained; then, the Act provides that no elementary or secondary school which is racially integrated shall receive state funds for the operation of the school lunch program or any other state funds, nor shall such a school receive free school books or school supplies.

The Texas statute, H.B. 65 of the 1957 Session, 2 Race Rel. L. Rep. 695 (1957), provides for a local referendum to determine whether to abolish the dual school system and to substitute integrated schools. If any school is integrated without holding such an election, the Act makes such school ineligible for accreditation and ineligible to receive any funds from a certain school trust fund, the Foundation Program Fund, the corpus of which consists of oil properties.

4. Repeal of Compulsory School Attendance Laws

Statutes requiring children between certain ages, usually from the age of seven to sixteen, to attend public or private schools have been repealed or amended by several of the Southern States. The apparent purpose of this type of legislation is to make provision for the statutory plans for closing the public schools or for pupil placement plans.

Mississippi and South Carolina appear to be the only states which have repealed their compulsory school attendance laws without reservation. See H.B. No. 31, 1956 Session of Mississippi General Assembly, 1 Race Rel. L. Rep. 422 (1956); S.C. A. & J.R. 1955 (49) 85.

The statutes amending the compulsory school attendance laws fall into several classes. In the first place, several states merely provide that no child will be required to attend any school which has been integrated. Other states have enacted provisions suspending the operation of the compulsory attendance law at racially integrated schools. Finally, at least one state has given the governor the authority to suspend the operation of the compulsory attendance law on certain occasions.

Illustrative of the first type of statute which affects the compulsory school attendance laws is that of Arkansas, Act No. 84, 1957 Session, 2 Race Rel. L. Rep. 453 (1957), which provides:

> "Notwithstanding any other provision of law, no child in the State of Arkansas shall be required to enroll in or attend any school wherein both white and Negro children are enrolled."

The statute of Virginia, chapter 59 of the 1956 Extra Session Laws, 1 Race Rel. L. Rep. 1096 (1956), contains practically the same terms, the Arkansas statute apparently being based upon the Virginia Act. Texas, in its Pupil Placement Act, makes a similar provision:

> "Section 8. Any other provision of law notwithstanding, no child shall be compelled to attend any school in which the races are commingled when a written objection of the parent or guardian has been filed with the Board, if such be the decision of the Local Board. If in connection therewith a requested assignment or transfer is refused by the Board, the parent or guardian may notify the Board in writing that he is unwilling for the pupil to remain in the school to which assigned, and the assignment and further attendance of the pupil shall thereupon terminate; and such child shall be entitled to such aid for education as may be authorized by law." H.B. No. 231, 1957 Session, 2 Race Rel. L. Rep. 693, 695 (1957).

Louisiana and North Carolina have amended their compulsory school attendance statutes to provide for the suspension of compulsory attendance upon the integration of a school. The Louisiana statute, H.B. No. 438, 1956 Session, 1 Race Rel. L. Rep. 728 (1956), requires the parents or persons standing in loco parentis of any child between the ages of seven and sixteen to send such child to a public or private day school, but suspends the operation of this provision in any "public school system and/or private day school wherein integration of the races has been ordered by any judicial decree or other authority." North Carolina provides that its compulsory attendance law will become inoperative:

". . . with respect to any child when the board of education of the administrative unit in which the child resides finds that: (a) such child is now assigned against the wishes of his parent or guardian, or person standing in loco parentis to such child, to a public school attended by a child of another race and it is not reasonable and practicable to reassign such child to a public school not attended by a child of another race, and (b) it is not reasonable and practicable for such child to attend a private non-sectarian school. . . ." 1956 Extra Session Laws, c. 5, 1 Race Rel. L. Rep. 938 (1956).

Georgia, although providing for the suspension of the compulsory attendance law, adopts a different approach, giving the Governor authority to suspend the operation of the law when such action is necessary because of any "riot, insurrection, public disorder, disturbance of the peace, natural calamity or disaster." Act No. 139, 1957 Session, 2 Race Rel. L. Rep. 453 (1957).

The Alabama legislature has not provided for the repeal or suspension of the compulsory attendance law, but rather has amended it to extend the educational institutions which will satisfy the requirement. Act No. 117, Second 1956 Special Session, 1 Race Rel. L. Rep. 717 (1956), amending section 297, title 52, Code of Ala. (1940). This Act, Section 3, requires that any child:

". . . between the ages of seven and sixteen years shall be required to attend a public school, private school, denominational school, parochial school, or be instructed by a competent private tutor, for the entire length of the school term in every scholastic year. . . . Each child, through his parents, legal custodian or guardian, shall have the right to choose whether or not he shall attend a school provided for members of his own race."

The Florida statute providing for the closure of public schools at which federal troops are stationed, see *supra*, also provides for the satisfaction of the compulsory attendance laws. Pupils enrolled in a school closed in accordance with the terms of that Act are to be counted "present" during the time the school is closed. See also Louisiana School Closing Act, *supra*.

B. The Validity of State Abandonment Plans

The more difficult problems raised by statutory plans requiring state abandonment and transfer of public educational functions will be treated in detail, *infra;* however, it seems appropriate at this point to consider the constitutionality of state abandonment legislation without regard to the additional problems raised by the educational transfer statutes.

Constitutional problems presented by these plans may arise under either the federal or state constitutions. The first test of any state statute is, of course, whether it conflicts with any provision of the state constitution. This is true even though the statute is questioned in the federal courts on federal grounds, since it is well settled that a federal court will avoid, whenever possible, adjudication of constitutional questions. This policy is reflected not only in the doctrine that federal questions will not be considered when it appears that the decision can be supported independently by substantial state grounds, but also in the doctrine of equitable abstention. Under this latter doctrine a federal court may, in the exercise of its equitable discretion, abstain from exercising its jurisdiction pending an authoritative determination of a doubtful point of state law in the state courts. See 2 Race Rel. L. Rep. 1215, 1222 (1957). It is readily apparent that this doctrine may be of particular importance in suits in the federal courts asserting the invalidity of the statutory plans on federal grounds.

The recent origin of these legislative plans plus the fact that the conditions requisite to their operation have not yet occurred means that at the present time there is no definite construction of the state abandonment plans in either the federal or state courts. However, newspaper reports indicate that the Arlington County, Virginia, school board, seeking a reversal of a court order requiring desegregation by September 23, 1957, *Arlington County School Board v. Thompson*, 252 F.2d 929, 3 Race Rel. L. Rep. 187 (4th Cir. 1958), relied in part upon the fact that the public schools would be closed if integrated. The Supreme Court denied certiorari. 356 U.S. 958, 3 Race Rel. L. Rep. 423 (1958). See also *Borders v. Rippy* and cases discussed *infra*.

1. Under the State Constitutions

As a general rule, most of the state constitutions provide that the legislature shall establish and maintain a system of free public education. Prior to the *School Segregation Cases*, such a provision was almost universally found in the state constitutions. A typical constitutional provision requiring free public education is found in Arkansas:

> "Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free schools whereby all persons in the State between the ages of six and twenty-one years of age may receive gratuitous instruction." Ark. Const. Art. 14, sec. 1 (1874).

The provisions are not all as simple and concise as that of Arkansas, however, one providing that the legislature's duty is "to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country." N. H. Const. Art. 83 (1784). Some of the provisions, on the other hand, are even more concise than that of Arkansas: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." N. Y. Const. Art. 11, sec. 1 (1894).

It would seem apparent, therefore, that any state operating under the typical constitutional provisions requiring free public education must amend its constitution prior to adopting a plan to withdraw the state from the field of education. The amendments adopted for that purpose have taken a variety of forms. Alabama, which previously had a provision requiring the legislature to "establish, organize, and maintain a liberal system of public schools throughout the state," Ala. Const. Art. XIV, sec. 256 (1901), has amended its constitution to read:

> "It is the policy of the State of Alabama to foster and promote the education of its citizens in a manner and extent consistent with its available resources, and the willingness and ability of the individual student, but nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense, nor as limiting the authority and duty of the legislature, in furthering or providing for education, to require or impose conditions or procedure deemed necessary to the preservation of peace and order.
>
> "The legislature may by law provide for or authorize the establishment and operation of schools by such persons, agencies, or municipalities, at such places, and upon such conditions as it may prescribe, and for the grant or loan of public funds and the lease, sale or donation of real or personal property to or for the benefit of citizens of the state for educational purposes under such circumstances and upon such conditions as it shall prescribe. Real property owned by the state or any municipality shall not be donated for educational purposes except to nonprofit charitable or eleemosynary corporations or associations organized under the laws of the state." Amend. CXI, Sec. 256 (1956).

It will be noted that under this amended provision although the Alabama legislature is under an obligation to "foster and promote" education, it apparently has no obligation to provide for free public education. South Carolina has also abrogated the constitutional requirement of free public schools, by an outright repeal of its constitutional provision requiring the legislature to establish and maintain free public schools. S. C. A. & J. R. 1952 (47) 2223 and A. & J. R. 1954 (48) 1695, repealing S. C. Const. Art. 11, Sec. 5 (1895).

In several states the provisions requiring the establishment and maintenance of free public education have been revised, not by deleting that provision, but by adding other provisions apparently intended to authorize the legislature to adopt one or more of the plans designed to withdraw the state wholly or in part from the field of education. The Virginia Constitution, for example, includes the following provision, apparently still in effect:

> "The General Assembly shall establish and maintain an efficient system of public free schools throughout the State." Va. Const. Art. IX Sec. 129 (1902).

However, section 141 of Article IX, providing for the appropriation of state funds, has been amended to read as follows:

> "No appropriation of public funds shall be

made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof; provided, first, that the General Assembly, may, and the governing bodies of the several counties, cities, and towns may, subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students in public and nonsectarian private schools and institutions of learning, in addition to those owned or exclusively controlled by the State or any such county, city or town; second, that the General Assembly may appropriate funds to an agency, or to a school or institution of learning owned or controlled by an agency, created and established by two or more States under a joint agreement to which this State is a party for the purpose of providing educational facilities for the citizens of the several States joining in such agreement; third, that counties, cities, towns and districts may make appropriations to nonsectarian schools of manual, industrial or technical training and also to any school or institution of learning owned or exclusively controlled by such county, city, town or school district." Amended November 4, 1952 (to allow grants to institutions created by two or more states); March 7, 1956 (to allow tuition grants).

Mississippi has amended its constitution in a similar manner. Article 8, section 201 provides:

> "It shall be the duty of the legislature to encourage by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement, by establishing a uniform system of free public schools by taxation or otherwise, for all the children between the ages of six and twenty-one years, and as soon as practicable to establish schools of higher grade."

Although section 201 remains in force, the legislature has been authorized by the section 213-B of Article 8 to abolish the public schools:

> "(a) Regardless of any provision of Article 8, or any other provision of this Constitution to the contrary, the legislature may authorize the establishment, support, maintenance and operation of public schools.
>
> "(b) Regardless of any provision of Article 8, or any other provisions of this Constitution to the contrary, the legislature shall be and is hereby authorized and empowered, by a majority vote of those present and voting in each House, to abolish the public schools in this state, and enact suitable legislation to effect the same."

Article IX, section 2 of the North Carolina Constitution also requires the legislature to "provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the state between the ages of six and twenty-one years." Section 12 of Article IX, added in 1956 provides:

> "Notwithstanding any other provision of this Constitution, the General Assembly may provide for payment of education expense grants from any State or local public funds for the private education of any child for whom no public school is available or for the private education of a child who is assigned against the wishes of his parents, or the person having control of such child, to a public school attended by a child of another race. A grant shall be available only for education in a nonsectarian school, and in the case of a child assigned to a public school attended by a child of another race, a grant shall, in addition, be available only when it is not reasonable and practicable to reassign such child to a public school not attended by a child of another race.
>
> "Notwithstanding any other provision of this Constitution, the General Assembly may provide for a uniform system of local option whereby any local option unit, as defined by the General Assembly, may choose by a majority vote of the qualified voters in the unit who vote on the question to suspend or to authorize the suspension of the operation of one or more or all the public schools in that unit."

In addition to these constitutional provisions which, though mandatory, merely state the general duty of the legislature, several of the state constitutions require the operation of the public schools for a designated period of time each year. For example, the California Constitution which combines these two type of provisions provides:

> "The legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established." Calif. Const. Art. IX, § 5 (1879).

The Mississippi Constitution contains a similar provision:

> "A public school shall be maintained in each school-district in the county at least four months during each scholastic year. A school district neglecting to maintain its school four months, shall be entitled only such part of the free school fund as may be required to pay the teacher for the time actually taught." Miss. Const. Art. 8, § 205 (1890). See also N. C. Const. Art. IX, § 3 (1868).

At the present time it seems impossible to do more than pose the constitutional problems raised by the enactment of state educational abandonment plans under state constitutional provisions of the type discussed above. North Carolina's local option plan, being expressly sanctioned by the recent constitutional amendment, appears to be subject to few, if any, state constitutional objections. The fact that Alabama, by amendment, and South Carolina, by repeal, have abrogated the express constitutional obligation to provide free public education would seem to diminish, at least, state constitutional objections to state abandonment plans. However, as noted presently, such objections may persist if the plan calls for the piecemeal closing of specific schools rather than for complete statewide closure.

Under the Virginia Constitution, as amended, it would appear that the legislature is still under an obligation to provide free public education. Instead of abrogating this constitutional obligation, the recent amendments apparently are designed merely to expand the power of the legislature and local administrative units to appropriate and expend money for the support of schools, or for tuition payments to children attending schools, not exclusively owned or controlled by the state or a local administrative unit.

The effect of the Mississippi constitutional amendment authorizing the legislature to abolish the Mississippi public schools, any other constitutional provision to the contrary notwithstanding, is uncertain. The general statement of the legislature's constitutional obligation to provide free public education remains on the books, as does the provision requiring the maintenance of a public school in each school district for at least four months or each scholastic year. The amendment undoubtedly affects the constitutional obligation to provide free public schools, but does it authorize the legislature to provide for less than complete abolition of the state school system? Moreover, the legislature which enacted the school closing legislation apparently did not think the obligation to provide a public school for at least four months during a scholastic year was affected by the constitutional amendment. It provided that while the school closing statute would not affect this constitutional obligation, the board of trustees had power to determine when the four months of school would be held. This provision of the Mississippi school closing statute was to be effective only so long as the constitutional provision was not repealed. See discussion, *supra*. Although the North Carolina constitution contains a provision requiring the operation of the public schools six months in each year, the express constitutional sanction of its local option plan probably obviates any problem similar to that of Mississippi.

Extent of Obligation

Perhaps the first problem raised by the school closing plans in states which have continued to operate under a constitutional obligation to provide public education is the extent of the obligation imposed upon the legislature. As a general rule, these constitutional provisions are merely general statements of the constitutional duty. Although considered mandatory, these provisions usually will not be construed as limiting the power of the legislature to accomplish more than the provision required:

> "Where a state constitution requires the legislature to provide educational opportunities for certain classes of children or for persons falling in a specified age group, the mandate will not, as a rule, be interpreted as an implied limitation on the power of the legislature. The legislature must do so much; it may do more." Edwards, *The Courts and the Public Schools* 28 (rev. ed. 1955).

Moreover, in the absence of specific constitu-

tional prohibitions, the state legislatures have plenary power, sometimes compared to the state police power, over educational policy. This arises from the fact that in legal theory the public schools are state, not local, institutions and that "public education is not merely a function of government; it is of government." According to Mr. Edwards, the existence of this plenary power means:

> "In the absence of constitutional prohibitions, the ends to be attained and the means to be employed are wholly subject to legislative determination. The legislature may determine the types of schools to be established throughout the state, the means of their support, the organs of their administration, the content of their curricula, and the qualifications of their teachers. Moreover, all these matters may be determined with or without regard to the wishes of the localities, for in education the state is the unit and there are no local rights except such as are safeguarded by the constitution." *Id.* at 27-28. See also 47 Am. Jur., *Schools* §§ 6-9 (1943).

From the standpoint of the validity of state abandonment statutes, a very important aspect of the legislative power to control and administer the educational facilities of the state is found in the alteration or dissolution of school districts. As a general rule, the legislature may, unless restricted by the state constitution, abolish, dissolve or alter the boundaries of school districts at will. 47 Am.Jur., *Schools* § 8, n. 8 (1943).

The existence of this extensive plenary power is of importance, by way of analogy at least, to a consideration of the validity of state abandonment plans in that it illustrates the broad latitude allowed a legislature operating under a constitutional obligation to provide public education. It will be recalled that the typical constitutional provisions required the operation of a "system" of free public schools, some provisions modifying the requirement by such adjectives as "general, suitable and efficient" or simply "efficient". See, *e.g.*, Ark. Const. Art. 14, sec. 1 (1874); Va. Const. Art. IX, sec. 129 (1902). This aspect of the validity of the state plans, therefore, may be reduced to whether the closing of a particular public school or a particular school district violates the obligation to provide a "system" or an "efficient system" of public schools. In view of the extensive power of the legislature with respect to the public schools, and more particularly with regard to the alteration and dissolution of school districts, it is difficult to see that the state abandonment plans do violate these state constitutional provisions. What constitutes a "suitable" or an "efficient" system would seem to be a decision for the legislature, with few practical limitations. It is to be noted however, that complete state-wide abandonment of public education is prohibited by these constitutional provisions, and that other constitutional limitations—*e.g.*, the provision that a school be operated for a stated length of time in any scholastic year—may be violated by the state abandonment plans. Further, the constitutional obligation is generally construed as being limited to elementary and secondary schools unless there is an express declaration to the contrary; therefore, legislative power with regard to institutions of higher education is not limited by these constitutional provisions.

Effect of "Uniformity" Provisions

Another constitutional question presented by state abandonment plans arises under the so-called "uniformity" provisions of the state constitutions. These provisions may be applicable to all legislation generally or may be contained in the constitutional provision imposing the obligation to provide free public education.

See generally 47 Am.Jur., *Schools* § 10 (1943); Edwards, *op. cit. supra*, at 32.

> "State constitutions commonly provide for a general and uniform system of public schools, free and open to all the children of the state between certain ages. Frequently, too, legislatures are prohibited from passing special or local legislation . . . Uniformity does not mean identity, a dead level of sameness, a complete lack of distinction or discrimination. It is not necessary that every school and every district should have exactly the same course of study, the same length of term, the same items of expense, or the same qualifications for teachers. Neither is it necessary that all the children of the state be given exactly the same educational privileges. The generality of a statute is not to be tested by the uniformity of results flowing from the exercise of the powers which it confers. The legislature may make classifications and confer different rights and impose different burdens upon each of the several classes. The courts seem to be unan-

imous in holding that the uniformity of a school system is not violated by any classification which is based upon real differences and distinctions and which operates equally upon all persons or things in the same class or situation. In determining whether the basis of classification is reasonable, the courts will look at the matter from the point of view of the legislature, always keeping in mind the object to be accomplished." Edwards, *op. cit. supra*, at 32-33.

It seems doubtful that state abandonment plans will be held to violate the uniformity provisions. By their very terms the plans apply equally to all school districts in the state, and any school, wherever located, may be closed or state funds may be withdrawn upon the happening of the contingency specified. No distinction is made with regard to any district or county within the state. This would seem to be true whether the plan requires piecemeal closing of public schools or complete statewide abandonment.

It is to be noted, however, that these uniformity provisions are not the same thing as equal protection of the law or due process of law provisions. The state constitution may well contain either or both of these latter provisions, and if so, piecemeal closing of particular schools may be subject to serious constitutional objections on state grounds. The question in such a case, however, is not whether the state abandonment plan operates uniformly and is applicable to all similarly situated school districts, but whether the closing of a particular school or school district while maintaining other schools or school districts denies the pupils affected by the closure the equal protection of the laws or violates due process of law. Thus, even though the state abandonment plan applies with equal force and effect to all of the school districts, the fact that one group of school pupils within the state is deprived of the right to attend a free public school while another group of school children is given that right may invalidate a state abandonment plan under a state equal protection clause. This is, of course, without regard to the similar provision in the Federal Constitution.

2. Under the Federal Constitution

Although the Federal Constitution may operate to restrict the power of the state over educational matters, it has generally been assumed that the Constitution does not obligate the states to provide educational opportunities to its citizens.

> "It can scarcely be doubted that the United States Constitution does not in any way require that a state afford any education to its children. Accordingly, those states which have repealed their requirements that the state furnish education would argue preliminarily that they have thus avoided the impact of the decision in the *School Segregation Cases*. And so they have —if there is a complete relinquishment of state support for public education." McKay, *"With All Deliberate Speed,"* 31 N.Y.U.L. Rev. 991, 1043 (1956).

This assumption is also apparent in Blaustein and Ferguson's discussion of the constitutionality of the South Carolina school closing plan:

> "If South Carolina *completely* abandons its public school system and makes no provision for any alternative system of education, it will have effectively avoided the consequences of *Brown v. Board of Education*." *Desegregation and the Law* 259 (1957).

It should be noted at this point that the absence of any constitutional provision expressly mentioning education means that affirmative federal power over educational matters must be implied. That is, the federal government, being a government of delegated powers, can establish or support education only in connection with some provision of the Constitution authorizing federal action. For example, the federal government can, under its military powers, maintain educational institutions such as West Point or Annapolis, and under its power to tax and appropriate money for the general welfare, may apparently render financial assistance to further public education. See Edwards, *op. cit. supra*, at 2-5.

The limitations imposed by the Constitution upon the states, however, apply to the states' power over education as well as other types of state action. More specifically, the Fourteenth Amendment prohibits the states from abridging the "privileges and immunities of citizens of the United States," of depriving any person of "life, liberty or property without due process of law" and of denying "the equal protection of the laws" to any person. For the purpose of considering the validity of state abandonment plans, only

the equal protection and due process clauses are of significance. However, one writer has deemed the privileges and immunities clause of importance in considering the states' power to promote or prohibit sectarian education, since it brings into the fourteenth amendment the separation of church and state decreed by the first amendment. See Edwards, *op. cit. supra*, at 8. The privileges and immunities clause has been interpreted to protect only those privileges and immunities which arise because of the relationship between a citizen and the United States and not those which arise as a result of state citizenship. Under this approach education is not within its protection. See 3 Race Rel. L. Rep. 133, 138 (1958), for a discussion of the privileges and immunities protected.

a. The Equal Protection Clause

The equal protection clause in substance requires the states to accord all persons in substantially the same situation equality of treatment under the law. Classification is permissible, together with differing treatment under law for different classes, provided a rational basis underlies the classification. Thus, the equal protection clause does not require the states to give any person any right, privilege or immunity directly, but it does prohibit the state from giving such a right, privilege or immunity to one person or group while withholding that right, privilege or immunity from other persons or groups which cannot reasonably be distinguished from the former. This is indicated by Chief Justice Warren's 1954 opinion in the *School Segregation Cases*:

> "It [education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, *where the state has undertaken to provide it*, is a right which must be made available to all on equal terms." (Emphasis added). 1 Race Rel. L. Rep. at 8.

In view of this principle of constitutional law, many authorities have expressed the opinion referred to above that complete state-wide abandonment of the public schools would not violate the equal protection clause. This is based on the rationale that there would be no deprivation of equal protection of the law, since no person, white or Negro, would have a right or privilege to attend public schools.

In this connection two cases involving the closing of state recreational facilities should be noted. In the first of these, *Clark v. Flory*, 141 F.Supp. 248, 1 Race Rel. L. Rep. 528 (E.D.S.C. 1956), *aff'd*, 237 F.2d 597 (4th Cir. 1956), Negroes in South Carolina sought a declaratory judgment as to their right to use the facilities of the state-owned Edisto Beach State Park on a racially non-discriminatory basis. Subsequently, the South Carolina legislature ordered the park closed, and the State Commission of Forestry closed it to members of both races. The court held that the question of admission to the park without regard to race had become moot:

> "Since the Edisto Beach Park has been closed by an Act of the Legislature and cannot be reopened except by another Act of the Legislature, there is no question for the Court to pass upon. A declaratory judgment is never granted unless there is an actual living controversy before the Court. . . .
>
> ". . . .
>
> "In the instant case there is no present necessity for any judgment for there is no controversy. Edisto Beach State Park has been closed to all.
>
> "No one contends that this Court has the power to require the State of South Carolina to operate any park. This Court cannot by mandamus order the reopening of the closed park." 1 Race Rel. L. Rep. at 528.

The plaintiffs also contended that closure by the legislature was merely a means of defeating the rights of Negroes to use the park, and that the legislature could reopen the park and upon the threat of court-ordered integration, could close it again before the Negroes could secure a court order. The court answered this contention by saying:

> "I cannot, and will not, assume that the Legislature of South Carolina would do such a thing. I can only assume that the Legislature meant what it said when it closed the Edisto Beach State Park. It would be a reflection on the honesty and integrity of this honorable body to assume

that they would open and close the park at its discretion and thereby circumvent the rights of the plaintiffs and other Negroes to use the park. Since the Legislature must act on this matter, it would certainly take a substantial length of time to reopen the park." 1 Race Rel. L. Rep. at 529.

The court distinguished certain other cases where the administrative agency which had control over the recreational facilities could close and reopen the facility at will, without having to wait for legislative action. See, *e.g.*, *Tate v. Dept. of Conservation and Development*, 133 F.Supp. 53, 1 Race Rel. L. Rep. 171, *aff'd*, 231 F.2d 615, 1 Race Rel. L. Rep. 530 (4th Cir.), *cert. denied*, 352 U.S. 838, 1 Race Rel. L. Rep. 1024 (1956) (immediate necessity for declaratory judgment since administrative agency could reopen park at any time).

In the recent case of *Tonkins v. Greensboro*, Civ. No. C-61-6-58, 3 Race Rel. L. Rep. 704 (M.D. N.C. 1958), Negro citizens of Greensboro, North Carolina, sought a declaratory judgment as to their right to use the city's white swimming pool on a racially nondiscriminatory basis and an injunction to prevent the city from selling the swimming pool in order to defeat the constitutional rights of the Negroes. As to declaratory relief, the court adopted the approach of *Clark v. Flory*, *supra*, holding that since the pool had been closed, there was no occasion for a declaratory judgment. The basic question presented, however, was whether the city could close the swimming pools and undertake to sell them "for the sole purpose of avoiding their duty to operate the pools on a racially integrated basis." 3 Race Rel. L. Rep. at 709.

> "The plaintiffs concede that this is the first case in which the right of a state or municipality to close or sell public facilities has been challenged as violative of the Constitution of the United States. . . . They seek to establish as a legal theory the proposition that there is a denial of equal rights where the purpose of the closing or sale is to avoid the necessity of operating the facilities on a racially integrated basis." 3 Race Rel. L. Rep. at 709.

The court then found that the city was not required to operate public recreational facilities under North Carolina law and that it had express authority to sell property and recreational facilities. The court then answered the plaintiff's contentions:

> "In the final analysis, the plaintiffs can only complain of discrimination or unequal treatment. If the swimming pools are closed to all, or disposed of through a bona fide public sale, there can be no unequal treatment and, therefore, no racial discrimination. No citizen of Greensboro will have access to municipal swimming facilities.
>
> "Unless persons under the same circumstances and conditions are treated differently there can be no discrimination. No person has any constitutional right to swim in a public pool. All citizens do have the right, however, if a public swimming pool is provided, not to be barred therefrom solely because of race or color. If the swimming pools are closed or sold, the rights of all groups will be equal, and it must follow that the closing or sale will not discriminate against anyone." 3 Race Rel. L. Rep. at 710.

The significance of these two cases to school closing statutes is apparent. In the first place, assuming state-wide abandonment, the court may refuse to grant declaratory relief as to the right of Negro children to attend the closed schools without discrimination on the basis of race. However, it is to be noted that the school closing statutes generally give the governor or administrative officials discretionary power to close and reopen the schools. This is the very feature which *Clark v. Flory* relied upon to distinguish other cases where declaratory relief had been granted. In the second place, again assuming state-wide abandonment, the courts may adopt the approach of these two cases and hold that since the schools are closed to all school children without regard to race, there is no discrimination and every person is being treated equally. The *Greensboro* case, if allowed to stand, is authority for the proposition that the state or municipal officials may close public recreational facilities as a means of avoiding their constitutional obligation to admit all persons without distinction on the basis of race or color. However, it should be remembered that the court first found there was no obligation on the city to provide the recreational facilities involved and that the city completely abandoned its effort to provide public swimming pools to any person.

Education-Recreation Distinctions

One important question is whether public schools will be treated differently from public recreational facilities. In at least one discussion of the state abandonment provisions the author declared that in view of the emphasis the Supreme Court placed upon public education in the *School Segregation Cases*, "it is improbable that the Court would give weight to an argument that mass-education, in mid-twentieth century, can be divested of its public character." Murphy, *Desegregation in Public Education—A Generation of Future Litigation*, 15 Md. L. Rev. 221, 232 (1955). The logical implication of this remark is that public schools will be treated differently from recreational facilities, and attempts to abandon public education will be ineffectual. There is, of course, no authoritative holding on the question at the present time.

The present plans for state abandonment, however, generally do not provide for complete state-wide abandonment. The closing is made contingent upon integration of the school or the use of federal troops to enforce a court order or maintain peace and order. This factor is of great significance in the eyes of several commentators on these plans. Mr. McKay has come to the following conclusion with respect to selective school closing or withdrawal of funds:

> "It would follow, then, that as a school is closed because a Negro is ordered admitted thereto, the appropriate state officials can be enjoined from discontinuing payments for the support of that school, at least so long as payments to any other school still operating on a segregated basis is continued." *Op. cit. supra*, at 1043.

The reasoning behind this opinion is found in Blaustein and Ferguson, *op. cit. supra*, at 259-60:

> "If, on the other hand, South Carolina pursues its present plan of closing a public school whenever a court orders the admission of a Negro to a particular school, the whole scheme will probably be held unconstitutional. At such time as the state would have closed down some school and would still be operating others, it obviously would be denying some of its school children—both white and colored—the equal protection of the laws."

In the *Greensboro* case the court indicated that the purpose of the closure or sale was immaterial. However, in determining whether or not the Virginia Pupil Placement Act was constitutional, the court looked to legislative intent as evidenced by the recommendations of committees and the governor and other acts and resolutions passed by the legislature. *Adkins v. The School Board of Newport News*, 148 F.Supp. 430, 2 Race Rel. L. Rep. 46 (E.D. Va. 1957). The court concluded that the purpose of the legislation and the legislative intent was to prevent racial integration in the public schools and that the act was, therefore, unconstitutional on its face. In so holding, the court used the Virginia school closing plan and the provisions for the withdrawal of state funds to indicate legislative intent. It would seem, therefore, that the legislative intent may be considered, at least, in determining its constitutionality, especially where the condition upon which its operation is to be based is the integration of the public schools. See also *Bush v. Orleans Parish School Board*, 138 F.Supp. 336, 337, 1 Race Rel. L. Rep. 305, 306 (E.D.La. 1956), *aff'd*, 242 F.2d 156, 2 Race Rel. L. Rep. 308 (5th Cir. 1957), *cert. denied*, 354 U.S. 921, 78 S.Ct. 1380, 1 L.Ed.2d. 1436, 2 Race Rel. L. Rep. 778 (1957), in which the statutes of the state of Louisiana "requiring or permitting" racial segregation were declared unconstitutional. Included in this group of statutes was the Louisiana Act, *supra*, requiring the withdrawal of state aid to any school which was integrated.

The state funds withdrawal legislation has also been before the courts in *Borders v. Rippy*, 247 F.2d 268, 2 Race Rel. L. Rep. 805 (5th Cir. 1957). The court there held that the fact that a school district will be deprived of state funds if it complies with an integration order does not relieve the court of its duty to apply the law of the land as set forth in the *School Segregation Cases*, nor does it relieve the school board of its duty to comply with the court order. See also *Dallas Independent School District v. Edgar*, 255 F.2d 455, 3 Race Rel. L. Rep. 656, (5th Cir. 1958).

b. The Due Process Clause

Briefly stated, one of the requirements of the due process clause is that an exercise of the state police power must be reasonably related to accomplish a valid governmental objective. This principle is illustrated by *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884, 1 Race Rel. L. Rep. 9 (1954) (one of the *School Segregation Cases*, from Washington, D. C.):

". . . The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

". . . .

". . . Liberty under law extends to the full range of conduct which the individual is free to pursue and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause." 1 Race Rel. L. Rep. at 10.

The question raised by the state abandonment plans under the due process clause, therefore, is whether closing public schools and denying all children enrolled therein of the opportunity to attend public schools is "reasonably related to any proper governmental objective." Again, it may be of importance that the plan calls for complete state-wide abandonment or selective abandonment of educational facilities upon racial integration, although it is probably not as important here as it is in the equal protection cases. If state-wide abandonment is required, the question will arise as to whether a child has a right to public education—*i.e.*, is one of the liberties guaranteed by due process the right to attend public schools, absent a state constitutional obligation to provide that education? In the case of selective abandonment, on the other hand, there might be a question as to whether the child's right to attend public schools is being burdened unreasonably by the state. Obviously the application of the due process clause of the fourteenth amendment to validity of the state abandonment plans remains in the area of speculation.

Generally, the state plans requiring that integrated schools be closed or that state funds be withdrawn also provide other means for the education of the children affected by such action. Integral parts of these plans provide for educational or tuition grants to individual children, appropriations to private schools, the establishment of private educational "co-operatives" or other institutions, or the sale, lease or donation of school property to private institutions. The most common provision is for educational grants to individual students, although these plans often include provision for sale, lease or donation of school property to private institutions in addition to or in lieu of these grants-in-aid.

III. Transfer of Public Education to Private Institutions

A. Educational Grants

1. Tuition Grants

Alabama

In the same amendment to the Alabama Constitution which abrogated the obligation to provide free public education, Alabama authorized the legislature to provide for tuition grants:

"The legislature may by law provide . . . for the grant or loan of public funds and the lease, sale or donation of real or personal property to or for the benefit of citizens of the State for educational purposes under such circumstances and upon such conditions as it shall prescribe." Ala. Const. § 256 (1901). See 1 Race Rel. L. Rep. 417, 418 (1956).

A proposed amendment to the Louisiana Constitution, H.B. 948, 1958 Session, 3 Race Rel. L. Rep. 780, would authorize, among other things, legislation providing for "financial assistance" to students:

"The Legislature shall have full authority to make provisions for the education of the school children of this State and/or for an educational system which shall include all

public schools and all institutions of learning operated by State agencies. In this connection, the Legislature may authorize and/or provide financial assistance to students attending private non-sectarian elementary and or secondary schools in this State, out of any monies or funds presently or hereafter dedicated or devoted to public schools or public education whether by this Constitution or by statute, anything in this Constitution to the contrary notwithstanding. A non-sectarian school, as used herein, shall mean a school whose operation is not controlled directly or indirectly by any church or sectarian body or by any individual or individuals acting on behalf of a church or sectarian body."

Georgia

Georgia has also taken steps to provide for tuition grants to school children in districts where the schools have been closed. In Act No. 11 of the 1956 Session the General Assembly, after providing for the closing of public schools by the Governor declared:

> "When the public schools of any such county, city or independent school district shall be closed, each child of school age resident within such county, city or independent school district shall be entitled each year thereafter to receive the benefit of an educational grant from the State and local funds as provided hereby in discharge of all obligations of the State in respect of education." 1 Race Rel. L. Rep. 418, 419 (1956).

The Act then provides for the mechanics of such tuition grants, including the mathematical formula to be used to figure the amount to be expended by the state and by local officials, and gives the governor power to establish rules and regulations for administration of these provisions. It also contains the common prohibition against the expenditure of such funds "for religious sectarian education."

North Carolina

The North Carolina statute is perhaps one of the most comprehensive. Article IV of the North Carolina Constitution was amended by adding section 12, which provides constitutional authority for educational expense grants. Such grants may be allowed:

> ". . . for the private education of any child for whom no public school is available or for the private education of a child who is assigned against the wishes of his parent, or the person having control of such child, to a public school attended by a child of another race. A grant shall be available only for education in a nonsectarian school, and in the case of a child assigned to a public school attended by a child of another race, a grant shall, in addition, be available only when it is not reasonable and practical to reassign such child to a public school not attended by a child of another race." 1 Race Rel. L. Rep. 928 (1956).

The implementing Act of the 1956 Extra Session of the North Carolina General Assembly, chapter 3, 1 Race Rel. L. Rep. 930, adopts substantially the same language in defining the school children eligible for such grants. The Act provides that each eligible child is to receive a grant from the State:

> ". . . equal to the per-day, per-student amount of State funds expended on public schools throughout the State during the preceding school year, but in no event, shall a grant for any child exceed the amount actually expended for the private education of such child." 1 Race Rel. L. Rep. at 931.

Application for an "educational expense grant" is to be approved by the board of education if it finds that:

> "(a) the child for whom application is made resides within the administrative unit; and
>
> "(b) there is no public school available for such child, or such child is now assigned against the wishes of his parent or guardian or of the person standing in loco parentis to such child to a public school attended by a child of another race and it is not reasonable and practicable to reassign such child to a public school not attended by a child of another race; and
>
> "(c) such child is enrolled in or has been accepted for enrollment in a private nonsectarian school, recognized and approved under Article 32 of this Chapter." 1 Race Rel. L. Rep. at 931.

The Act also allows the local authorities to appropriate money for a local educational expense grant. The school children eligible for such local grants must also be eligible for a state grant, and essentially the same general pro-

visions are applicable to the local grants as are applicable to the state grants. See §§ 13-19, 1 Race Rel. L. Rep. at 933.

Virginia

The Virginia legislation on tuition grants is found in several different Acts of the 1956 Extra Session of the Virginia General Assembly. Chapter 56, 1 Race Rel. L. Rep. 1092, appropriates to public boards of education the equivalent of funds which may be withheld from such boards of education because of integration, in order that such funds may be available for furnishing tuition grants to qualified students. Section 3 of that chapter provides that such grants shall be distributed in accordance with the following formula:

> "(a) Each pupil attending a nonsectarian private school, elementary or secondary as the case may be, shall be entitled to an amount equal to the quotient derived by dividing the total amount withheld for the elementary or secondary public school system by the enrollment of pupils formerly attending those schools which comprised the elementary or secondary public school system for which such amounts have been withheld." 1 Race Rel. L. Rep. at 1092.

Chapter 57 of the 1956 Extra Session Laws, 1 Race Rel. L. Rep. at 1093, authorizes local authorities to levy and collect educational taxes where no such tax levy is otherwise provided or to appropriate tax monies for the support of public schools or for educational expense grants:

> "The educational funds raised or appropriated under §§ 1, 2, 3 and 4 hereof, or otherwise made available, shall be expended by the school board in payment of grants for the furtherance of the elementary or secondary education, as the case may be, of the children of such county, city or town in nonsectarian private schools." 1 Race Rel. L. Rep. at 1094.

Chapter 58 makes provisions for the budgeting and expenditure of grants to pupils for education in private nonsectarian schools. 1 Race Rel. L. Rep. 1094 (1956). The budgets are to include an estimate of the amounts necessary for such grants, but the fact that the budget is not before the local authorities who appropriate the money will not affect their authority to make an appropriation for such purposes. Section 3 then provides:

> "The educational funds so raised and other available funds shall be expended by the local school board in payment of grants for the furtherance of the elementary or secondary education, as the case may be, of the children of such county, city or town in nonsectarian private schools; such payments shall be made to parents, guardians or other persons having custody of children who have been assigned or are in attendance at public schools wherein both white and colored children are enrolled; provided, the parents, guardians or other persons having custody of such children shall make affidavit to the local school board that they object to the assignment of such children to or their attendance at any school wherein both white and colored children are enrolled." 1 Race Rel. L. Rep. at 1095.

Section 4 provides that the amount of the grant shall be the amount necessary to send the child to a private nonsectarian school, provided that the total amount of the local and state grants "shall not exceed the total cost of operation per pupil in average daily attendance in the public school for the locality making such grant."

Chapter 62 authorizes the local school boards to transfer and spend school funds by making educational expense grants to pupils for education in private, nonsectarian schools:

> "The local school board of every county, city or town is hereby authorized when it is deemed to be for the public benefit, to transfer school funds, excluding those for capital outlay and debt service, within the total amount of its authorized budget, without the consent of the tax levying body . . . and to expend same in furtherance of the elementary and secondary education of the children of such county, city or town in nonsectarian private schools as may be permitted by law." 1 Race Rel. L. Rep. 1097, 1098.

Chapter 68, the school closing act, also provides for educational expense grants to the pupils affected by the closing of the schools. 1 Race Rel. L. Rep. 1103, 1105. Other provisions of this series of acts refer to educational expense grants or indirectly affect such grants. See 1 Race Rel. L. Rep. 1091-1113 (1956).

2. Appropriations to Private Institutions

It is generally not clear whether the tuition grants are to be paid directly to the parents or guardians of the pupil or to the private institutions which he attends. Outright appropriations of state funds to private institutions for educational purposes have not been provided for in the plans discussed thus far, but such appropriations would appear to be a definite possibility. It should be noted that the appropriation could be made to a fund established for the purpose of lending money to the private educational institutions. See, *e.g.*, Ala. Const. Art. XIV, § 256, as amended. ("grant or loan of public funds . . . to or for the benefit of citizens" of Alabama).

B. Establishment of Private Schools

Alabama

Statutes providing for incorporation or establishment of organizations to operate private schools are not common. The Alabama constitutional amendment, Am. CXI, amending § 256 (1957), *supra*, provides that:

> "The legislature may by law provide for or authorize the establishment and operation of schools by such persons, agencies, or municipalities, at such places, and upon such conditions as it may prescribe."

Louisiana

The 1958 session of the Louisiana Legislature enacted a statute "to provide for the establishment of educational cooperatives." Act No. 257, 3 Race Rel. L. Rep. 768 (1958). Section 2 of that Act provides:

> "Cooperative, non-profit membership cooperations may be organized under this Act, for the purpose of conducting private elementary or secondary schools or educational facilities."

These cooperatives are to have the power, among other things, to:

> "(4) Plan, acquire, offer, and provide all types of elementary and secondary educational services;
>
> "(5) Plan, acquire, offer, and provide all types of educational facilities necessary and offer, sell and issue, notes, bonds, and other evidences of indebtedness.
>
> "(6) Make loans to persons to whom educational services will be supplied by the cooperatives for the purpose of, and otherwise assist other persons in, maintaining and operating educational facilities. . . ."

Section 9 of the Act, subsection A, provides who may be a member of such cooperative:

> "A. No person who is not an incorporator, shall become or remain a member of a cooperative unless such person is the parent of, tutor, or guardian of, or the person standing in loco parentis to, a child or children using the educational services or facilities furnished by the cooperative or a child or children who have used such facilities within the preceding two (2) years. The by-laws may provide that any person, including an incorporator shall cease to be a member thereof, unless a child or children of whom he is the parent, tutor, or guardian, or the person standing in loco parentis, make use of the educational services or facilities of the cooperative within a specified time after such person has become a member thereof."

In most other respect, the Act is similar to a general incorporation statute.

C. Transfer of School Property

As a rule, the states in their political subdivisions have power to lease or sell property belonging to them under general legislation. See *e.g.*, Vernon's Texas Stat. Ann. §§ 5306-5337; Ala. Code Ann. tit. 47, § 57, tit. 8, § 236; Ariz. Rev. Stat. Ann. §§ 37-231, 37-281; Ark. Stat. Ann. §§ 10-501-531, 10-701-709; Fla. Stat. Ann. §§ 270.01—.28; Tenn. Code Ann. §§ 12-212, 215. Georgia, however, has enacted specific legislation for the transfer of school property to private educational interests. Act. No. 13, 1956 Session, 1 Race Rel. L. Rep. 420 (1956), provides for the leasing of public school property for private school purposes. Section 1 of that Act provides:

> "That the various counties, cities, municipalities, county boards of education, city boards of education and governing bodies of independent school districts or systems of this state shall have authority to lease any school house or other school property for private educational purposes to any person, group of persons, or corporation which is or

will be bona fide engaged in the operation of a private school, provided that said lease shall be for a period not longer than five (5) years."

Georgia Act. No. 14, 1956 Session, 1 Race Rel. L. Rep. 420 (1956), provides for the subleasing, for private educational purposes, of certain school properties leased by the states. The operative portion of the Act are provisions which read as follows:

"Provided, however, nothing contained in this Act shall prevent such political subdivisions, departments, institutions, agencies, county boards of education, city boards of education, or governing bodies of independent school districts or systems from subleasing any structure, building, or facility of the Authority, for private educational purposes to any person, group of persons, or corporations which is or will be bona fide engaged in the operation of a private school."

It is to be noted that several states have seen fit to enact specific legislation with regard to the disposal of recreational facilities, as distinguished from educational facilities. See, *e.g.*, 1 Race Rel. L. Rep. 732 (1956) (Alabama); 1 Race Rel. L. Rep. 427 (1956) (Georgia).

Louisiana has also provided for the sale, lease or disposal of school property in its school closing act: Act. No. 256 § 7, 3 Race Rel. L. Rep. 778 (1958).

"Any parish and city School Board may sell, lease, or otherwise dispose of, at public or private sale, for cash or on terms of credit, any real or personal property used in connection with the operation of any school or schools within its jurisdiction which has been indefinitely closed by order of the Governor as provided herein, to any private agency, group of persons, corporation, or cooperative bona fide engaged in the operation of a private non-sectarian school, when in the opinion of such Board the best interest of the schools system would be served by such action. In any such sale, lease, or disposal the consideration provided, whether represented by cash or credit, shall be equal to the reasonable value of the property, which, in case of a sale, shall be not less than the replacement costs of the property sold."

IV. Problems of Constitutionality

In a previous section, the constitutionality of the school closing and withdrawal of state funds statutes has been discussed. This section is primarily directed toward constitutional problems raised by the transfer of the public educational function to private interests. However, it is impossible to separate the two types of statutes completely, and the discussion here is also applicable to the statutes requiring state abandonment of public education. As previously noted, the courts are likely to consider the statutes *in pari materia*—that is, as integral parts of a single legislative plan.

The constitutional problems which may arise in connection with the statutory plans for state abandonment and transfer of public education may be categorized into several classes. The first is concerned with the meaning and effect of the language of the 1955 opinion in the *School Segregation Cases, supra*. Secondly, the very important concept of "state action" under the fourteenth amendment must be considered. The third problem involves the sale, lease, or donation of public property to private interests. Finally, the problem of whether the appropriation of state funds is for a "public purpose" must be considered. It is to be noted, also, that the problem of the separation of church and state is involved, although, most of the statutory plans prohibit the use for sectarian education of funds or properties furnished by the state.

A. The School Segregation Cases

The Supreme Court's 1955 opinion in the *School Segregation Cases* declared that "all provisions of federal, state or local law *requiring*

or permitting" racial segregation in the public schools are violative of the fourteenth amendment. 1 Race Rel. L. Rep. at 11. (Emphasis added). Laws, and customs or usage (when supported by legal sanctions) which either require or permit racial segregation in public education are declared unconstitutional. For the purposes of this study, it is important to give close attention to the use of the word "permitting." Thus, one constitutional problem raised by the statutory plans under consideration may be stated as follows: Do such plans require or permit the maintenance of racial segregation in public education?

The lower federal courts have utilized this language of the Supreme Court on several occasions to nullify laws which did not on their face require racial segregation, as well as those which expressly required such segregation. Emphasizing the language of the *School Segregation Cases*, a three-judge federal district court held that certain Louisiana statutes requiring racial segregation under the state's police power and withdrawing state funds from integrated schools did not present a serious constitutional question, but were unconstitutional on their face. *Bush v. Orleans Parish School Board, supra.* The Tennessee School Placement Act, 2 Race Rel. L. Rep. 215 (1957), was declared unconstitutional by the federal district court on the ground, *inter alia*, that authorizing school boards to maintain separate schools for Negro and white children was "permitting" racial segregation in public education, even though the Act required the school board to determine the "preference" of the parents of school children. *Kelly v. Board of Education of Nashville, Tennessee*, 2 Race Rel. L. Rep. 970, 973-75 (M.D. Tenn. 1957).

From these cases it appears that the federal courts are going to scrutinize carefully the state plans to abandon and transfer the public educational function, determining first whether the plans require or permit racial segregation. Moreover, in making this determination a court is likely to look to the legislative intent as expressed not by these statutes alone, but by all of the statutes and resolutions dealing with school segregation. If the court is convinced that the legislative intent is to permit the maintenance of racial segregation in public education and that the statutory plans are merely an implementation of this intent and not a bona fide effort to deal with the state's educational problems, the plans will in all probability be struck down.

In Blaustein and Ferguson's *Desegregation and the Law, op. cit. supra*, at 240-41, the authors express a similar proposition in terms of "avoidance" and "evasion":

> "In analyzing the legality of any measure designed to circumvent the operation of an announced rule of law, the courts make an important distinction between 'avoidance' and 'evasion.' There are no constitutional limitations to measures of 'avoidance.' It is perfectly proper—at least as far as the courts are concerned—for an individual or a state full of individuals to attempt to 'avoid' the consequences of desegregation. 'Evasion,' on the other hand, is against the law. . . . [G]overnmental measures designed to evade the Supreme Court's conclusions would be struck down as unconstitutional."

B. State Action

Shortly after the fourteenth amendment was adopted, the Supreme Court held that the amendment, by its very terms, was limited to state action. *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883). The Supreme Court declared: "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment." 109 U.S. at 11. Thus, if the educational function can be effectively transferred to private interests, the decision in the *School Segregation Cases* can be avoided.

The question raised by these statutory plans, however, is whether the educational function has been effectively transferred to private interests in such a manner that the action cannot be fairly attributed to the state. Although the concept of state action has been treated in detail in a prior study, 1 Race Rel. L. Rep. 613 (1956), it is of such importance in the present study that it must be considered further. This is particularly true of certain decisions which indicate the method by which the court may determine whether state action is present. For the purposes of the present study, several classes of cases are of particular importance—namely, the restrictive covenant cases, the primary election cases, the labor union cases, the "private" education and company town cases, and the leasing cases.

1. THE RESTRICTIVE COVENANT CASES

The leading case dealing with state action in the enforcement of racially restrictive covenants is *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). In that case the plaintiff sought to enforce a covenant restricting the use and occupancy of the property in question to members of the white race. The agreement was the product of purely private action and did not in itself violate the fourteenth amendment. However, state action was found in the fact that the state court had entered an order enforcing the covenant. The Supreme Court reviewed some of the earlier cases involving similar restrictions on the use of land, including *Corrigan v. Buckley*, 271 U.S. 323, 46 S.Ct. 521, 70 L.Ed. 969 (1926). The *Corrigan* case, which had held that racially restrictive covenants were valid, was distinguished, since it arose in the District of Columbia and did not present the question of state action in the enforcement of the covenant. The Supreme Court also reiterated its previous holding that such covenants were valid:

> "We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated. Cf. *Corrigan v. Buckley, supra.*
>
> "But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. The respondents urge that judicial enforcement of private agreements does not amount to state action. . . ." 334 U.S. at 13-14.

The court then reviewed cases in which action by the judicial branch of the state governments had been held to be state action, concluding:

> "The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the states to which the Amendment has references [sic] includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government." 334 U.S. at 18.

Applying these principles to the enforcement of the racially restrictive covenant by the state court, the Supreme Court declared:

> "We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.
>
> "These are not cases . . . in which the States have merely abstained from action, leaving private individuals free to impose such discrimination as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.
>
> ". . . .
>
> "We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. . . ." 334 U.S. at 19-20.

In 1953 the Supreme Court went a step further, and in *Barrows v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586, held that enforcing a racially restrictive covenant by granting damages for its breach, rather than enjoining the breach of the covenant, was also state action. Again, the reasoning was based on the fact that "the state allowed private persons to invoke the 'coercive power' of the courts to secure compliance with a covenant requiring racial exclusion." Paul, *The School Segregation Decision* 43 (1954).

2. The Primary Election Cases

The primary election cases are also of particular importance in illustrating the manner in which the federal courts determine whether state action is present. Obviously state laws denying a person the right to vote on the basis of race or color are unconstitutional. See 3 Race Rel. L. Rep. 371 (1958). Many states, however, merely authorized the party conducting the primary election to set the qualifications for voters in the election. This situation was presented the Supreme Court in *Nixon v. Condon*, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932). There, the executive committee of each political party in Texas was authorized by statute to determine who was a qualified voter in the party's primary, and Negroes were excluded. In determining whether racial exclusion could be attributed to the State, the Supreme Court said:

> "The pith of the matter is simply this, that when . . . agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the state itself, the repositories of the official power. They are then the governmental instruments whereby parties are organized and regulated to the end that government itself may be established or continued. What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere. They are not acting in matters of merely private concern like the directors or agents of business corporations. They are acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbroken and smoothly. Whether in given circumstances [political] parties or their committees are agencies of government within the Fourteenth or the Fifteenth Amendment is a question which this court will determine for itself. . . . The test is not whether the members of the Executive Committee are the representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their actions." 286 U.S. at 88, 89.

Texas amended the primary laws so that the qualifications of voters in a primary election would be established by the state convention of the party. Again Negroes were declared ineligible to vote in the primary election. In 1944, the Supreme Court looked to the primary laws as a whole and held that the party's action could be attributed to the state:

> "We think that this statutory system . . . makes the party which is required to follow these legislative directions an agency of the State in so far as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party. . . . In numerous instances, the Texas statutes fix or limit the fees to be charged. Whether paid directly by the State or through state requirements, it is state action which compels." *Smith v. Allwright*, 321 U.S. 649, 663, 664, 64 S.Ct. 757, 88 L.Ed. 987 (1944).

In *Rice v. Elmore*, 72 F.Supp. 516 (E.D. S.C.), *aff'd*, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875, 68 S.Ct. 905, 92 L.Ed. 1151 (1948), state action was found even though the state had completely repealed its statutory regulation of primary elections, leaving the matter in the hands of the political parties. South Carolina had eliminated from its Constitution and laws "all regulation of political parties and primary elections," because of the decision in *Smith v. Allwright, supra*. The federal district court held:

> ". . . The method used in the present Democratic Party of South Carolina is distinctly the same *'customs and usage'* that has been

in use long before 1944. . . . [T]he repeal of the statutes heretofore referred to makes practically no difference whatsoever in its life and growth. . . . [T]he State Democratic Party . . . adopted rules that were almost verbatim to the statutes that had been repealed. . . . These may not be laws or statutes in name but they certainly amount to *'custom, usage or regulation'* and are the act of the *people.*

". . . .

". . . Racial distinctions cannot exist in the machinery that selects the officers and lawmakers of the United States; and all citizens of this State and Country are entitled to cast a free and untrammelled ballot in our elections, and if the only material and realistic elections are clothed with the name 'primary', they are equally entitled to vote there." 72 F.Supp. at 527-28.

Finally, in 1953, the Supreme Court extended the state action concept applied to primary election cases to cover a "private" association. *Terry v. Adams,* 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953) (the "Jaybird" case). There, the Jaybird Association selected the candidates who ran in the official Democratic primary; the Association's elections were not governed by state law nor did the Association use the state election machinery. The Association's candidates, however, had been nominated in the primaries and elected to office in the general election for more than sixty years. The Supreme Court held that denying a person the right to vote in the Association's elections solely because of race or color violated the Constitution. See also *Perry v. Cyphus,* 186 F.2d 608 (5th Cir. 1951).

These cases apparently are authority for the proposition that as long as the primary election serves essentially a state function, even though the election is conducted by an entirely private organization, it must be conducted subject to the same constitutional restraints against racial discrimination as are applicable to general elections conducted by the state.

3. The Labor Union Cases

Under present federal statutes providing that a union certified as bargaining agent for a given unit has the exclusive right to bargain collectively with the employer, it has been held that the bargaining agent cannot discriminate against non-members nor on the basis of race or color. *Steele v. L. & N. R.R. Co.,* 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944). In essence, the Supreme Court held that a certified bargaining agent under the Railway Labor Act was a "quasi-public" body subject to the constitutional restraints applicable to other public bodies:

"We think that the Railway Labor Act imposes upon the statutory respresentative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . but it has also imposed on the representative a corresponding duty. We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.

". . . [I]t is enough for present purposes to say that the statutory power to represent a craft and to make a contract as to wages, hours and working conditions does not include authority to make among members of the craft discriminations not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations." 323 U.S. at 202-03. See also *Graham v. Brotherhood of Locomotive Firemen and Enginemen,* 338 U.S. 232, 70 S.Ct. 14, 94 L.Ed. 22 (1949); *Syres v. Oil Workers International Union,* 350 U.S. 892, 76 S.Ct. 152, 100 L.Ed. 785, 1 Race Rel. L. Rep. 20 (1955), and cases cited.

The Supreme Court recently declined to review a decision which involved the issue of whether a labor union, as a "quasi-public" body, is required to admit persons to membership

without regard to race. *Oliphant v. Brotherhood of Locomotive Firemen and Enginemen,* 156 F. Supp. 89, 2 Race Rel. L. Rep. 1128 (N.D. Ohio 1957), *cert. denied,* 355 U.S. 893, 78 S.Ct. 266, 2 L.Ed.2d 191, 3 Race Rel. L. Rep. 6 (1957). Under the opinion of the federal district court, labor unions are free to discriminate on the basis of race or color in determining who will be admitted to membership.

4. The Leasing Cases

Prior to the decision in the *School Segregation Cases,* the question of whether a lessee of public property could discriminate on the basis of race or color had been raised in several cases. *Lawrence v. Hancock,* 76 F.Supp. 1004 (S.D. W.Va. 1948); *Culver v. City of Warren,* 84 Ohio App. 373, 83 N.E.2d 82 (1948). Both of these cases involved the lease of a city swimming pool, and in both cases it was held that the fact of the lease did not relieve the city of the duty to see that the pool was not operated in a discriminatory manner. In the *Lawrence* case the court said that the "power to lease does not include the power to discriminate against members of a minority race in the exercise of their constitutional rights." 76 F.Supp. at 1008. The city's duty was expressed as follows:

> "It is not conceivable that a city can provide the ways and means for a private individual or corporation to discriminate against its own citizens. Having set up the swimming pool by authority of the Legislature, the City, if the pool is operated, must operate it itself, or if leased, must see that it is operated without any such discrimination." 75 F.Supp. at 1009.

Since the *School Segregation Cases,* the same result has been reached in several cases, including *Muir v. Louisville Park Theatrical Association,* 347 U.S. 971, 74 S.Ct. 783, 98 L.Ed. 1112, 1 Race Rel. L. Rep. 14 (1954). In that case one of the various facilities of a public park, an amphitheater, had been leased to a private organization. The Sixth Circuit Court of Appeals held that the private organization "was guilty of no unlawful discrimination . . . in refusing admission to colored persons." 202 F.2d 275 (1954). The Supreme Court reversed and remanded the case "for consideration in the light of the *Segregation Cases* decided May 17, 1954, *Brown v. Board of Education* . . . and conditions that now prevail." 1 Race Rel. L. Rep. at 15.

A somewhat similar case arose in Texas and involved the operation of a restaurant in a county courthouse by a lessee. *Derrington v. Plummer,* 240 F.2d 922, 2 Race Rel. L. Rep. 117 (5th Cir. 1956). The federal district court had held that the county, having undertaken to provide such facilities, must afford substantially equal facilities to all and that the lessee's operation of the restaurant was state action. *Sub nom. Plummer v. Case,* 1 Race Rel. L. Rep. 532 (S.D. Tex. 1955). The fifth circuit affirmed, stating:

> "No doubt a county may in good faith lawfully sell and dispose of its surplus property, and its subsequent use by the grantee would not be state action. Likewise, we think that, where there is no purpose of discrimination, no joinder in the enterprise, or reservation of control by the county, it may lease for private purposes property not used or needed for county purposes, and the lessee's conduct in operating the leasehold would be merely that of a private person. Those principles do not, however, control the decision of this case for several reasons.
>
> ". . . [T]he basement of the courthouse can by no means be termed surplus property not used nor needed for County purposes. To the contrary, the courthouse had just been completed, built with public funds for the use of the citizens generally, and this part of the basement had been planned, equipped and furnished by the County for use as a cafeteria . . .
>
> "Further, the express purpose of the lease was to furnish cafeteria service for the benefit of persons having occasion to be in the County Courthouse. If the County had rendered such a service directly, it could not be argued that discrimination on account of race would not be violative of the Fourteenth Amendment. The same result inevitably follows when the service is rendered through the instrumentality of a lessee; and in rendering such service the lessee stands in the place of the county. His conduct is as much a state action as would be the conduct of the County itself." (Citations omitted) 2 Race Rel. L. Rep. at 119. See also *Department of Conservation and Development v. Tate,* 231 F.2d 615, 1 Race Rel. L. Rep. 530 (4th Cir. 1956) (injunction requiring park be operated on non-discriminatory basis or, if leased, that defendants see

that lessee operated park on such a basis); *Greensboro v. Simpkins*, 246 F.2d 425, 2 Race Rel. L. Rep. 817 (4th Cir. 1957) (right to use public golf course cannot be abridged by lease to private person).

5. The Education and Private Town Cases

These cases illustrate the application of state action to private educational institutions which have some connection with the state, whether through financial aid or otherwise, and to wholly-owned private or "company" towns.

In one of the first of these cases, *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir. 1945), the plaintiff, a Negro, sought an injunction to restrain defendants, a private corporation which maintained a school for librarians, from refusing to admit plaintiff solely on the basis of her race. The plaintiff contended that state action was present since the school received large grants of financial aid from the city and was subject to state regulation in fiscal matters. The court granted the injunction:

> "We know of no reason why the state cannot create separate agencies to carry on its work in this manner, and when it does so, they become subject to the constitutional restraints imposed upon the state itself." 149 F.2d at 218.

It should be noted that in this case, the court strongly emphasized the fact that the private school was receiving a large amount of its financial support from the municipal government.

Financial support alone may not be sufficient, however, since some courts have seemingly required more. See, *e.g.*, *Norris v. Mayor and City Council of Baltimore*, 78 F.Supp. 451 (D.C. Md. 1948); *Dorsey v. Stuyvesant Town Corp.* 229 N. Y. 512, 87 N.E. 2d 541 (1949), *cert. denied*, 339 U.S. 981, 70 S.Ct. 1019, 94 L.Ed. 1385 (1950); *Johnson v. Levitt & Sons, Inc.* 131 F. Supp. 114, 1 Race Rel. L. Rep. 158 (E.D. Pa. 1955). (*Cf. Ming v. Horgan*, 3 Race Rel. L. Rep. 693 (Super Ct., Calif. 1958). The *Stuyvesant Town Corp.* case held that the fact of tax exemptions plus the use of the power of eminent domain was not sufficient to constitute state action. The *Johnson* and *Ming* cases deal with the effect of federal statutes guaranteeing home mortgages, and they reach contrary results.

The lengthy litigation involving Girard College is of particular importance in this field of race relations law. Stephen Girard, who died in 1831, established a testamentary trust for the education of "poor male white orphans." The trust was administered by the Board of Directors of City Trusts in Philadelphia. Negro applicants were refused admission on the ground that they were not "white" as required by the will, and they brought an action to enjoin the Board of City Trusts from refusing to admit them. The Supreme Court of Pennsylvania affirmed a lower court decision refusing the injunction, holding that there was no state action. *Estate of Stephen Girard*, 386 Pa. 548, 127 A.2d 287, 2 Race Rel. L. Rep. 68 (1956). The United States Supreme Court reversed and remanded, finding state action in the fact that the trust was administered by an agency of the City of Philadelphia. *Sub. nom. Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230, 77 S.Ct. 806, 1 L.Ed.2d 792, 2 Race Rel. L. Rep. 591 (1957). The Pennsylvania Supreme Court remanded the case to the Orphan's Court for further proceedings, 2 Race Rel. L. Rep. 811 (1957), and the Orphan's Court, finding that the dominant purpose of the testator was to provide a school for "poor male white orphans," directed that the Board of City Trusts be removed as trustees and substituted thirteen private persons. 2 Race Rel. L. Rep. 992 (1957). The Pennsylvania Supreme Court affirmed, and found that the removal of the trustee by the state court would not constitute such state action as to bring the trust under the doctrine of *Shelley v. Kraemer*, *supra*. 391 Pa. 434, 138 A.2d 844, 3 Race Rel. L. Rep. 188, *cert. denied*, 3 Race Rel. L. Rep. 424 (U.S.S.Ct. 1958). *Shelley v. Kraemer* and *Barrows v. Jackson*, *supra*, were distinguished on the ground that in those cases it was a constitutionally guaranteed right of an individual that was the subject of the discrimination, whereas in the *Girard* case the plaintiffs had no constitutionally protected right to share in the benefits of a private trust.

Finally, the case of *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946), illustrates that purely private ownership of property may be subjected to the constitutional restraints of the Fourteenth Amendment if a "governmental" function is being performed. In that case defendant was convicted of trespass for disseminating religious literature on the streets of a wholly-owned company town. The Supreme Court of the United States reversed the conviction:

". . . Ownership does not always mean absolute dominion . . . Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation. And, though the issue is not directly analogous to the one before us, we do want to point out by way of illustration that such regulation may not result in an operation of these facilities, even by privately owned companies, which constitutionally interferes with and discriminates against interstate commerce.

". . . .

". . . Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such a manner that the channels of communication remain free.

". . . .

". . . In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute." 326 U.S. at 506, 507, 509.

6. Application to the State Abandonment and Transfer Plans

These cases indicate that the legality of the state abandonment and transfer plans will depend upon the Supreme Court's analysis of the method by which the private schools are created and the control of the state over these schools. If the court is satisfied that the sovereign power of the state has been used, whether directly or indirectly, in the establishment and operation of the schools, it may well adopt the *Shelley v. Kraemer* approach and find state action. As one commentator has pointed out, the exertions of power by the state is not the same in the establishment of the private schools as in the restrictive covenant cases. The distinction is:

"that the state would not be using judicial power to *'coerce'* private parties to exclude Negroes as it was in the covenant cases; rather it would, at most, be using legislative and executive power to *enable* private parties to do that which the state can now no longer do by its own official hand." Paul, *op. cit. supra*, at 44.

However, Mr. Paul also finds some similarities in the two types of cases:

"In both, it is the positive action of the state which makes possible the exclusion of Negroes. In both, the state acts to create by law private property rights when it is clear that those property rights will be used by the proprietors to achieve a result which the state could not achieve by itself on its own initiative. In both, the state has—in an active and not a passive sense (and that is important)—'encouraged' private parties to work a racial discrimination. Thus a significant problem in the free private school plan is whether the exertion of state power to create and maintain the schools will subject those schools to the limitation of the Fourteenth Amendment." *Ibid.*

The primary election cases point up the problem which may arise any time a "governmental function" is entrusted to a private organization. The *Rice* case points out that the state cannot abrogate an important function, such as regulating elections, traditionally performed by government. The *"Jaybird"* case adds to this principle in that it holds that a private organization exercising such a function is to be treated as if it were in the same position as the state. Closely analogous to these cases is the *Marsh* case involving the company town.

The distinction, if any, between this group of cases and the state transfer plans must relate to the degree of importance attached to the educational function—that is, is education as important a governmental function as regulating elections? It can scarcely be doubted that today education is one of the most important of governmental functions. In the *School Segregation Cases*, it was said to be the very basis of state and federal citizenship. Final determination of this problem rests, of course, with the Supreme Court of the United States, but that court will find many state court precedents to the effect that education is an almost indispensable function of government. See, *e.g.*, *Malone v. Hayden*, 329 Pa. 213, 197 Atl. 344, 352 (1938); *Campbell*

v. Aldrich, 159 Ore. 208, 79 P.2d 257, 261 (1938). One commentator, in examining these school plans, said:

> "In the segregation decision by the Supreme Court, Chief Justice Warren places heavy emphasis on the effect of schooling . . . In light of this, it is improbable that the Court would give weight to an argument that mass-education, in mid-twentieth century, can be divested of its public character." Murphy, *Desegregation in Public Education —A Generation of Future Litigation*, 15 Md. L. Rev. 221, 232 (1955).

The labor union cases indicate that if the states attempt to give the private school organizations special powers, powers to affect the rights and duties of the people of the state, the organization may well be declared an arm of the state. For example, it is possible that in a state which retains a compulsory school law, but completely withdraws from the field of education, a private organization which is to provide educational facilities will be treated as an agent of the state. It would at least be another factor in the total situation which the court will look to in order to determine whether state action is present.

The significance of the leasing cases is fairly obvious. If the precedents established in this line of authority are followed, the probable result will be that any state which leases its public school facilities will have to take steps to require the lessee to operate the schools on a non-discriminatory basis. Moreover, the *Girard* and *Kerr* cases seem to indicate that if privately owned facilities are controlled or otherwise subject to regulation or administration by the state or an agency thereof, state action will be found.

The true picture, however, cannot be obtained by looking at these various authorities separately; only when the cases are considered together can the concept of state action be seen clearly. Thus, the significance of these cases to the present study is found in the fact that they illustrate that very little actual exertion of sovereign power is necessary to find state action. Mr. Paul, summarizing the importance of these state action cases, has declared that:

> "the cases show that labels mean little; nor is it decisive that an alleged racial discrimination has been wrought by some person or group which occupies no official relationship with the state." *Op. cit. supra*, at 50.

Finally, the conclusions of Robert McKay as to the question of state action must be noted:

> "The concept of state action may be subjected to vigorous scrutiny if any state actually does, as several have threatened, abandon public education altogether as a public function . . . [M]ost of these contemplate some substantial state aid to students or to private schools to take the place of state schools. This would be clearly insufficient to avoid the state-action label. However, if the public schools should be abandoned, the building be allowed to remain empty, and tuition grants be given to school-age children without any restriction on the kind of schooling for which spent, as Virginia apparently contemplates, the question would be more difficult. Even in that event, it remains true that the segregated private schools, to which the funds would presumably be channeled, would in fact, if not in law, be exercising what has long been recognized as a public function, the furnishing of education at the primary and secondary levels. On the authority of the white-primary cases and others condemning state action by private corporations, it might well be found that even this attenuated connection with the state constituted state action. In short, it may well be that the stigma of state action can only be avoided by a state which is willing to forego education for the general body of its citizens altogether—that is, neither operating schools itself nor offering tuition assistance to students for use in private schools practicing segregation." *Op. cit. supra*, at 1082-83.

To summarize, the restrictive covenant, primary and labor union cases indicate that there are three principal connections with the state which may well be sufficient to establish state action:

> "1. The active exertion of state power to help the organization execute its purposes;
>
> "2. The discharge of an important governmental function;
>
> "3. The discriminatory use by a private organization of a special privilege granted to it by the state." Paul, *op. cit. supra*, at 57.

The problem is apparently one of degree—

that is, do the facts of any given case indicate a degree of connection with the state sufficient to attribute the action of the private organization to the state? The three factors mentioned will be of particular importance in determining whether the degree of connection is present.

C. The Public Purpose Doctrine

It is a generally accepted principle of state and federal constitutional law that public funds must be spent for a "public purpose." This principle

> "is designed as a prohibition against special governmental subsidies to private individuals which contribute only to the benefit of the recipient and not to the benefit of the public at large. The idea is that the government should not tax all men to reward one man; money taken from the citizen by the tax power must be expended to the advantage of all." Paul, *op. cit. supra*, at 53.

The federal constitutional principle is applicable as against the federal government under the language of the fifth amendment and as against the state governments under the fourteenth amendment. The contention was stated in *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 17 S.Ct. 56, 41 L.Ed 369 (1896):

> "It is claimed, however, that the citizen is deprived of his property without due process of law, if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by assumption of the right of eminent domain. In that way the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the State instead of the Federal government." 164 U.S. at 158.

The essence of the "public purpose doctrine" is commonly included in state constitutions. See N.Y. Const., Art. 7, § 8; Mass. Const., Art. 46, § 148 (2). And see Almond v. Day, 91 S.E.2d 660, 1 Race Rel. L. Rep. 83 (Va. Ct. App. 1955), applying the now-repealed provision of the Virginia Constitution to a tuition-grant case.

The major difficulties lie not in finding generalizations as to what is or what is not a public purpose, but in applying these generalizations to concrete situations. Various authorities have stated the general principles clearly:

> "It has been said that no better test can be presented than the inquiry whether the thing to be furthered by the appropriation of the public revenue is something which it is the duty of the state, as a government, to provide. This test, however, seems to be too limited as there may be power to provide without a duty to provide. Another test mentioned is whether 'the proceeds of the tax will directly promote the welfare of the community in equal measure.' The right to tax depends upon 'the ultimate use, purpose and object for which the fund is raised.' There is no power to tax for an object not within the purposes for which governments are established." 1 Cooley, *Taxation* § 175 (4th ed. 1924).
>
> "So far as a public purpose is concerned, the nature or character of the person, natural or artificial, through whom or by whom the proceeds of the tax is to be applied or used, is immaterial. If the purpose is public, it does not matter whether the agency through which the money is dispensed is public or private, since the appropriation or tax is not made for the agency but for the object which it serves. The right to tax 'depends upon the ultimate use, purpose and object for which the fund is raised, and not on the nature or character of the person or corporation whose intermediate agency is to be used in applying it'." *Id.* at § 184.

In the earlier cases, the Supreme Court tended to subject the purpose of a tax or appropriation to close scrutiny. Several of these cases involved appropriations designed to aid in the establishment of industry in the state or municipality, and until fairly recent times, the courts were likely to hold that no public purpose was present. In *Loan Association v. Topeka*, 87 U.S. (20 Wall.) 655, 22 L.Ed. 455 (1874), for example, the city of Topeka, Kansas, issued bonds, the proceeds of which were to be donated to a private company in order to encourage and aid the company in the establishment of a manufacturing plant in the city. Plaintiff brought suit to collect the interest due. The Supreme Court held that the bonds were not issued for a public purpose and that the interest coupons were, therefore, unenforceable. In the course of the opinion the court made several pertinent observations:

"We have established, we think, beyond cavil that there can be no lawful tax which is not laid for *a public purpose.* It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not.

". . . [I]n deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they [the courts] must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government. . . ." 87 U.S. at 664-65.

Cases decided in more recent times, however, have not tended to be as strict. In *Green v. Frazier,* 253 U.S. 233, 40 S.Ct. 499, 64 L.Ed. 879 (1920), the court declared:

"When the constituted authority of the State undertakes to exert the taxing power, and the question of the validity of its action is brought before this court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action." 253 U.S. at 239.

Exemplifying the modern approach is *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245 (1937), which held that taxation to relieve individuals of the hardships incident to unemployment was for a public purpose.

"The states, by their constitutions and laws, may set their own limits upon their spending power [citations omitted], but the requirement of due process leaves free scope for the exercise of a wide legislative discretion in determining what expenditure will serve the public interest. This court has long and consistently recognized that the public purposes of a state, for which it may raise funds by taxation, embrace expenditures for its general welfare. [Citations omitted]. The existence of local conditions which, because of their nature and extent, are of concern to the public as a whole, the modes of advancing the public interest by correcting them or avoiding their consequences, are peculiarly within the knowledge of the legislature, and to it, and not to the courts, is committed the duty and responsibility of making choice of the possible methods." 301 U.S. at 514-15.

Paul, *op. cit. supra,* at 54-55, recognizes that early cases may provide some authority for *invalidating* the tuition grants provided for in recent legislation in various southern states. However, he concludes that those decisions will not be controlling in the current situation:

". . . In the first place, judicial notions about the 'public purpose' served by subsidies to private individuals have generally become more liberal. This, after all, is an age of subsidies, and there are many in the field of education: the G.I. Bill of Rights, the Fulbright scholarships, and numerous other governmental grants are illustrative. Presumably, today, a court would be reluctant to cast doubts on the legality of these ventures. There is also a trend to adhere more closely to the general principle that great 'deference' must be paid to the legislature's determination of what constitutes a 'public purpose', and there has been a tendency among the courts to declare that when the state lavishes educational grants on a child, the resulting benefit to the child supplies *per se* a benefit to the state. These idea are especially noticeable in recent Supreme Court cases. . . ."

The author supports his conclusion by reference to *Cochran v. Louisiana Board of Education,* 281 U.S. 370, 50 S.Ct. 355, 74 L.Ed. 913 (1930), where the action of a state in supplying free textbooks to children attending private and parochial schools was held not to be in violation of the due process clause, and *Everson v. Board of Education,* 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), where the board's action of reimbursing parents of children attending parochial schools for money spent in transporting the children to and from school was held not to be in violation of the due process clause.

It should be noted that raising the question, in the federal courts, of the validity of expenditures of public funds may present the threshold problem of the sufficiency of the plaintiff's legal interest or standing to sue. See *Doremus v. Board of Education,* 342 U.S. 429, 72 S.Ct. 394,

96 L.Ed. 475 (1952). Special aspects of the problem of constitutionality where a parochial school would be the recipient of the benefit of tuition grants are apparently avoided under the current legislation, inasmuch as the statutes uniformly specify that grants shall be used for "non-sectarian" education.

In view of such decisions as those handed down in the *Cochran* and *Everson* cases, supra, and of the emphasis placed on education in the *School Segregation Cases* as well as in many state court decisions declaring that education is a governmental function, it appears unlikely that appropriations for the advancement of education will be struck down on the ground that they do not serve a public purpose. However, the strength of the arguments supporting the validity of tuition grants as against the public purpose objection may present a dilemma to proponents of these plans. The same factors which justify the grants as being for a public purpose tend to support the contention that the total arrangement for maintaining private segregated schools will amount to "state action" for purposes of the Fourteenth Amendment.

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